DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 13-301
Title: United States, Petitioner
v.
Michael Clarke, et al.
Docketed: September 6, 2013
Linked with 13A27
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (12-13190)
Decision Date: April 18, 2013
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jul 2 2013	Application (13A27) to extend the time to file a petition for a writ of certiorari from July 17, 2013 to August 16, 2013, submitted to Justice Thomas.
Jul 5 2013	Application (13A27) granted by Justice Thomas extending the time to file until August 16, 2013.
Jul 31 2013	Application (13A27) to extend further the time from August 16, 2013 to September 6, 2013, submitted to Justice Thomas.
Aug 12 2013	Application (13A27) granted by Justice Thomas extending the time to file until September 6, 2013.
Sep 6 2013	Petition for a writ of certiorari filed. (Response due October 7, 2013)
Oct 3 2013	Order extending time to file response to petition to and including November 6, 2013.
Nov 1 2013	Order further extending time to file response to petition to and including December 6, 2013.
Dec 6 2013	Brief of respondents Michael Clarke, et al. in opposition filed.
Dec 20 2013	Reply of petitioner United States filed.
Dec 24 2013	DISTRIBUTED for Conference of January 10, 2014.
Jan 10 2014	Petition GRANTED.
Feb 11 2014	SET FOR ARGUMENT ON Wednesday, April 23, 2014
Feb 14 2014	Joint appendix filed.
Feb 14 2014	Brief of petitioner United States filed.
Feb 20 2014	Record received from U.S.D.C. Southern District of Florida is electronic. (Not PACER)
Mar 10 2014	CIRCULATED.
Mar 17 2014	Brief of respondents Michael Clarke, et al. filed. (Distributed)
Apr 14 2014	Reply of petitioner United States filed. (Distributed)

Apr 23 2014	Argued. For petitioner: Sarah E. Harrington, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondents: Edward A. Marod, West Palm Beach, Fla.
Jun 19 2014	Judgment VACATED and case REMANDED. Kagan, J., delivered the opinion for a unanimous Court.
Jul 21 2014	JUDGMENT ISSUED

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

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No. 13-301

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL CLARKE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an unsupported allegation that the Internal Revenue Service (IRS) issued a summons for an improper purpose entitles an opponent of the summons to an evidentiary hearing to question IRS officials about their reasons for issuing the summons.

PARTIES TO THE PROCEEDINGS

The petitioner is the United States of America.

The respondents are Michael Clarke, as Chief Financial Officer of Beekman Vista, Inc.; Michael Clarke, as Chief Financial Officer of Dynamo GP, Inc.; Dynamo Holdings Limited Partnership; Rita Holloway, as Trustee for the 2005 Christine Moog Family Delaware Dynasty Trust; Marc Julien, as Trustee for the 2005 Robert Julien Family Delaware Dynasty Trust; and Robert Julien.

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In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL CLARKE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is not published in the *Federal Reporter* but is reprinted in 517 Fed. Appx. 689. The order of the district court in the lead case in these consolidated actions (App., *infra*, 10a-19a) is not published but is available at 111 A.F.T.R.2d 2013-1697. The orders of the district court in the remaining cases (App., *infra*, 20a-63a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 2013 (App., *infra*, 7a-9a). On July 5, 2013, Justice Thomas extended the time within which to file

a petition for a writ of certiorari to and including August 16, 2013. On August 12, 2013, Justice Thomas further extended the time to September 6, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this petition. App., *infra*, 85a-90a.

STATEMENT

1. Congress has "authorized and required" the Secretary of the Treasury "to make the inquiries, determinations, and assessments of all taxes" imposed by the Internal Revenue Code (Code) that "have not been duly paid by stamp at the time and in the manner provided by law." 26 U.S.C. 6201(a); see 26 U.S.C. 7601 ("The Secretary shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax."). The Secretary has delegated that duty to the Commissioner of Internal Revenue. 26 C.F.R. 301.7602-1(b), 301.7701-9.

As the Secretary's delegate, the Internal Revenue Service (IRS or Service) has broad statutory authority to issue summonses in furtherance of its investigatory responsibility. "For the purpose of ascertaining the correctness of any return, making a return where none has been made, [or] determining the liability of any person for any internal revenue tax," the Commissioner is authorized "[t]o examine any books, papers, records, or other data which may be relevant or material to such inquiry" and to summon any person

to appear and produce such documents and to give relevant testimony. 26 U.S.C. 7602(a)(1)-(3). Section 7602(b) further provides that the IRS may issue a summons, examine documents, or take testimony for "the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws." The IRS thus "has broad authority to examine the accuracy of federal tax returns," including the authority to issue summonses. *Church of Scientology* v. *United States*, 506 U.S. 9, 10 n.2 (1992); see *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 815-816 (1984) ("In order to encourage effective tax investigations, Congress has endowed the IRS with expansive information-gathering authority; § 7602 is the centerpiece of that congressional design."); *United States* v. *Euge*, 444 U.S. 707, 716 n.9 (1980) ("Congressional intent to provide the Secretary with broad latitude to adopt enforcement techniques helpful in the performance of his tax collection and assessment responsibilities is expressed throughout the Code.").

When a summoned party fails to comply with a summons, the United States may petition a federal district court to enforce the summons. 26 U.S.C. 7402(b), 7604(a). Congress intended summons-enforcement proceedings to be "summary in nature." *United States* v. *Stuart*, 489 U.S. 353, 369 (1989) (quoting S. Rep. No. 494, 97th Cong., 2d Sess. Pt. 1, at 285 (1982)). The purpose of a summons-enforcement proceeding is not to determine guilt or tax liability, but to obtain information relevant to the IRS's fulfillment of its statutory obligation to examine tax returns. In order to enforce a contested summons, the IRS must demonstrate that: (1) "the investigation

will be conducted pursuant to a legitimate purpose"; (2) "the inquiry may be relevant to the purpose"; (3) "the information sought is not already within the Commissioner's possession"; and (4) "the administrative steps required by the [Internal Revenue] Code have been followed." *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964). Such a showing demonstrates "good faith in issuing the summons." *Stuart*, 489 U.S. at 359; see *United States* v. *LaSalle Nat'l Bank*, 437 U.S. 298, 318 (1978).[1]

The government generally satisfies its initial burden of demonstrating good faith by filing an affidavit from the investigating agent attesting to the *Powell* factors. *United States* v. *Medlin*, 986 F.2d 463, 466 (11th Cir.), cert. denied, 510 U.S. 933 (1993); *United States* v. *Garden State Nat'l Bank*, 607 F.2d 61, 68 (3d Cir. 1979); see *Stuart*, 489 U.S. at 360 (noting that affidavits filed by the IRS "plainly satisfied the requirements of good faith [the Court] set forth in *Powell* and [later] repeatedly reaffirmed"). Once the United States has made its initial showing of good faith, the burden is on the party challenging a summons to either disprove one of the *Powell* factors or to demonstrate that enforcement of the summons would constitute an abuse of the court's process (because, for example, it was issued for an improper purpose). *Powell*, 379 U.S. at 57-58; see *Stuart*, 489 U.S. at 360.

2. a. IRS agents examined the information returns of Dynamo Holdings Limited Partnership (DHLP) for the 2005-2007 tax years. App., *infra*, 10a-11a, 21a,

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[1] The IRS may not issue a summons or initiate an enforcement proceeding if the Service has referred the relevant taxpayer to the Department of Justice for potential criminal prosecution 26 U.S.C. 7602(d).

32a, 43a, 54a. During the examination, questions arose about debt that DHLP had reported on its returns, including interest expenses totaling $34 million over two years. *Id.* at 11a, 21a, 32a, 43a, 54a. In September and October 2010, as part of an effort to obtain information for the investigation, the IRS issued five summonses to third parties connected to DHLP whom the government had reason to believe had information and records relevant to DHLP's tax-reporting obligations during the tax years at issue. *Id.* at 11a-12a, 21a-22a, 32a-33a, 43a-44a, 54a-55a; Gov't C.A. Br. 4-5. The summonses directed the recipients to give testimony and to produce for examination certain books, records, papers, and other data relating to the investigation. App., *infra*, 11a-12a, 21a-22a, 32a-33a, 43a-44a, 54a-55a. None of the recipients complied with the summonses. *Ibid.*

In December 2010, pursuant to 26 U.S.C. 6223, the IRS issued to the partnership a notice of Final Partnership Administrative Adjustment (FPAA) that proposed adjustments to items on the partnership's tax returns for 2005-2007. App., *infra*, 12a, 22a, 33a, 44a, 55a. For partnerships, an FPAA serves the same purpose that a notice of deficiency serves for an individual taxpayer, and it is generally a prerequisite to any assessment by the IRS of a deficiency attributable to the partnership. See 26 U.S.C. 6221-6223. The issuance of an FPAA gives partners in the relevant partnership the right to challenge the adjustment in the United States Tax Court, a district court, or the Court of Federal Claims. 26 U.S.C. 6226(a); see App., *infra*, 12a, 22a, 33a, 44a, 55a. In February 2011, the partnership filed a petition for readjustment in the Tax Court, challenging the determinations in the

FPAA. App., *infra*, 12a, 22a, 33a, 44a, 55a. That proceeding remains pending. See *DHLP* v. *Commissioner*, No. 2685-11 (T.C.).

b. Because none of the recipients of the IRS's summonses responded, the United States filed five petitions for enforcement in the United States District Court for the Southern District of Florida. App., *infra*, 12a, 22a, 33a, 44a, 55a. The United States attached to each petition a declaration, attesting to satisfaction of the *Powell* factors, executed by the IRS agent who had issued the relevant summons. See *id.* at 12a-14a, 22a-24a, 33a-35a, 44a-46a, 55a-57a. DHLP intervened as a respondent, and several respondents moved for summary dismissal of the petitions or alternatively for the scheduling of a pretrial conference to allow discovery. See *id.* at 11a, 21a, 32a, 43a, 54a; Gov't C.A. Br. 2-3.

In support of those requests, respondents asserted that "[t]here must have been some ulterior motive" (*i.e.*, other than for a legitimate investigatory purpose) for the IRS's issuance of the summonses. App., *infra*, 72a. Respondents identified several possible motives, including "retribution for DHLP's refusal to grant a further extension of the applicable statute of limitations, a subterfuge to gather information related to [another party], in order to justify reopening the examination of its returns for the same periods or part of a larger scheme on the part of the government to send out such summonses in hopes of being able to use them to subvert the Tax Court Discovery Rules once a Tax Court case was commenced." *Ibid.* Respondents argued that they were entitled to explore their allegations through discovery and an evidentiary hearing. *Id.* at 73a-75a. They did not identify any evidence

already available to them that would support their allegations.

c. The district court ordered the summonses enforced. App., *infra*, 10a-63a. The court held that respondents had failed to rebut the United States' prima facie case for enforcement under *Powell*. *Id.* at 13a, 23a, 34a, 45a, 56a. The court also rejected respondents' various allegations of ulterior motive as legally irrelevant, conjectural, or incorrect as a matter of law. *Id.* at 13a-17a, 23a-27a, 34a-38a, 45a-49a, 56a-60a.

Finally, although the district court acknowledged that respondent is entitled to an adversarial hearing, it denied respondents' requests for an evidentiary hearing and discovery. App., *infra*, 17a-18a, 27a-28a, 38a-39a, 49a-50a, 60a-61a. The court explained that a district court is not required to hold an evidentiary hearing "upon a mere allegation of improper purpose," noting that this Court upheld a district court's discretionary decision not to hold a hearing in a challenge to an IRS summons when the court determined that "an evidentiary hearing on the question of enforcement was unnecessary." *Id.* at 17a-18a, 27a-28a, 38a-39a, 49a-50a, 60a-61a (quoting *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 324 n.7 (1985)). The district court explained that, because respondents had made "no meaningful allegations of improper purpose" that warranted discovery or an evidentiary hearing, it declined to order either. *Id.* at 18a, 28a, 39a, 50a, 61a.

3. The court of appeals reversed in an unpublished per curiam opinion. App., *infra*, 1a-6a. Although the court agreed with the district court that respondents were not entitled to discovery, it held that the district

court had abused its discretion by declining to hold an evidentiary hearing based on respondents' bare allegation that the IRS "may have issued the summonses * * * solely in retribution for [one respondent's] refusal to extend a statute of limitations deadline." *Id.* at 5a-6a & n.3. In the view of the court of appeals, respondents were "entitled to a hearing to explore their allegation of an improper purpose" and "to ascertain whether the [IRS] issued a given summons for an improper purpose." *Id.* at 5a-6a (quoting *Nero Trading, LLC* v. *U.S. Dep't of Treasury*, 570 F.3d 1244, 1249 (11th Cir. 2009)). The court also stated that, "in situations such as this, requiring the taxpayer to provide factual support for an allegation of an improper purpose, without giving the taxpayer a meaningful opportunity to obtain such facts, saddles the taxpayer with an unreasonable circular burden, creating an impermissible 'Catch 22.'" *Id.* at 5a (quoting *Nero Trading, LLC*, 570 F.3d at 1250).

REASONS FOR GRANTING THE PETITION

Before the IRS is entitled to have a district court enforce a summons issued pursuant to 26 U.S.C. 7602, the IRS must establish that the summons was issued in good faith by demonstrating that the factors this Court set forth in *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964), have been satisfied. Under the court of appeals' decision, however, such a showing of good faith is insufficient to obtain an enforcement order in the Eleventh Circuit if a summons opponent alleges that the IRS issued the summons for an improper purpose, even if the allegation is wholly speculative and lacking in evidentiary support. In the court of appeals' view, such an allegation standing alone entitles the summons opponent to an evidentiary hearing

at which it may question IRS agents about their motives for issuing the summons. That holding is inconsistent with the effective enforcement of federal tax laws, with this Court's decisions construing the IRS's summons authority, and with decisions of every other court of appeals with jurisdiction over IRS summons actions. Review is warranted to correct the Eleventh Circuit's erroneous decision, to resolve a conflict among the courts of appeals, and to prevent potential serious impairment of the IRS's ability to enforce our tax laws within the Eleventh Circuit.

A. An Unsupported Allegation That The IRS Issued A Summons For An Improper Purpose Does Not Entitle A Summons Opponent To An Evidentiary Hearing At Which It May Question IRS Agents About Their Motives For Issuing The Summons

1. The court of appeals held that, whenever a summons opponent alleges that the challenged summons was issued for an improper purpose, and requests an opportunity to cross-examine the responsible IRS officials about their motives for issuing the summons, a district court abuses its discretion if it declines to hold an evidentiary hearing at which such questioning may take place. That holding has no basis in, and would impede the effective implementation of, the statutory scheme governing enforcement of our tax laws.

Congress has both "authorized and required" the IRS "to make the inquiries, determinations, and assessments of all taxes" imposed by the Internal Revenue Code, 26 U.S.C. 6201(a), including by making a "[c]anvass" of every internal revenue district and "inquir[ies] after and concerning all persons therein who may be liable to pay any internal revenue tax," 26

U.S.C. 7601. In furtherance of those statutory responsibilities, Congress has granted the IRS broad authority to issue summonses "[f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax * * * , or collecting any such liability." 26 U.S.C. 7602. This Court has repeatedly recognized that the IRS's summons authority is broad and serves a vital information-gathering role in our federal system of taxation. See, *e.g.*, *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 814-815 (1984); *United States* v. *Euge*, 444 U.S. 707, 714 (1980); *United States* v. *Bisceglia*, 420 U.S. 141, 145-146 (1975).

As the Court explained in *Arthur Young & Co.*:

> Our complex and comprehensive system of federal taxation, relying as it does upon self-assessment and reporting, demands that all taxpayers be forthright in the disclosure of relevant information to the taxing authorities. Without such disclosure, and the concomitant power of the Government to compel disclosure, our national tax burden would not be fairly and equitably distributed. In order to encourage effective tax investigations, Congress has endowed the IRS with expansive information-gathering authority; § 7602 is the centerpiece of that congressional design.

465 U.S. at 815-816; see *Bisceglia*, 420 U.S. at 146 (noting that investigations pursuant to Section 7601, enforced through the summons authority of Section 7602, "are essential to our self-reporting system"). Accordingly, "this Court has consistently construed congressional intent to require that if the summons authority claimed is necessary for the effective perfor-

mance of congressionally imposed responsibilities to enforce the tax Code, that authority should be upheld absent express statutory prohibition or substantial countervailing policies." *Euge*, 444 U.S. at 711.

When a taxpayer refuses to comply with an IRS summons, the IRS may file an enforcement petition in a federal district court. See 26 U.S.C. 7402(b), 7604(a); *Donaldson* v. *United States*, 400 U.S. 517, 524 (1971). This Court has recognized, however, that when Congress authorized district courts to enforce Section 7602 summonses, it did not "intend[] the courts to oversee the [IRS's] determinations to investigate." *Powell*, 379 U.S. at 56. A district court's role in deciding whether to enforce a summons is limited to determining whether the summons was issued in good faith—*viz.*, whether the investigation will be conducted pursuant to a legitimate purpose, whether the summons inquiry may be relevant to that purpose, whether the information sought is not already in the possession of the IRS, and whether the administrative steps required by the Code have been followed. *Id.* at 57-58. If the IRS makes that showing, it is entitled to have its summons enforced.

A summons opponent may challenge the enforcement of a summons on "any appropriate ground." *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964). A summons opponent is entitled to a reasonable opportunity, including if appropriate an in-person adversary hearing, to present legal argument as to why a summons should be quashed. If a summons opponent alleges that a summons was issued for an improper purpose, he is also entitled to a reasonable opportunity to apprise the court of evidence already in his possession that substantiates the allegation.

It does not logically follow, however, that a summons opponent should in every instance be entitled upon request to cross-examine IRS officials about their reasons for issuing a summons. Congress intended that summons-enforcement proceedings would "be summary in nature." *United States* v. *Stuart*, 489 U.S. 353, 369 (1989) (quoting S. Rep. No. 494, 97th Cong., 2d Sess. Pt. 1, at 285 (1982)). Summons proceedings do not accuse any taxpayer of wrongdoing, *Bisceglia*, 420 U.S. at 146, and enforcement of a summons is not a determination of guilt or liability. The purpose of the summons scheme is "to inquire," *ibid.*, and swift resolution of summons disputes is essential "so that the investigation may advance toward the ultimate determination of civil or criminal liability, if any," *United States* v. *Kis*, 658 F.2d 526, 535 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982).

Congress's intent that summons proceedings be resolved expeditiously is reflected in its enactment of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324. In *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), this Court held that the IRS could not issue a summons if the Service had already made an "institutional commitment" to refer the relevant taxpayer to the Department of Justice for possible criminal prosecution. *Id.* at 313-318. In the ensuing four years, that holding "spawned protracted litigation" in summons proceedings about the IRS's motivations for issuing particular summonses, "without any meaningful results for taxpayers." S. Rep. No. 494, *supra*, at 285.

TEFRA expanded the IRS's summons authority to encompass the investigation of "any offense" as long as the IRS has not actually referred the matter to the

Department of Justice. See TEFRA § 333, 96 Stat. 622; 26 U.S.C. 7602(b) and (d). To reduce the volume of litigation associated with enforcement of IRS summonses, Congress thus replaced the prior "institutional commitment" standard, which turned in part on IRS officials' subjective intent regarding potential criminal referrals, with an objective standard that turns on the presence or absence of an actual referral. By vesting summons opponents with the right to question IRS officials about their motives for issuing summonses, the Eleventh Circuit's inflexible rule frustrates Congress's purposes in enacting that provision.

2. The court of appeals' decision also finds no support in this Court's precedents. Although the court of appeals relied on *Powell*, see App., *infra*, 3a-5a (citing *Powell*, 379 U.S. at 48, 58), the Court in *Powell* made clear that a summons opponent bears a heavy burden in challenging the enforcement of a summons. The Court explained that the IRS is entitled to judicial enforcement of a summons once it establishes (by showing compliance with the *Powell* factors) that the summons was issued in good faith. 379 U.S. at 57-58. A court may thereafter inquire into the IRS's motive for issuing a summons, but it is required to do so only if the taxpayer satisfies his "burden of showing an abusive use of the court's process." *Id.* at 58. A taxpayer cannot satisfy that burden with bare assertions, but must "raise[] a substantial question that judicial enforcement of the administrative summons would be an abusive use of the court's process." *Id.* at 51.[2]

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[2] This Court has never squarely confronted the question whether a district court has discretion not to hold an evidentiary hearing to explore unsupported allegations of improper motive. In *Tiffany*

When (as in this case) a summons opponent asserts that an IRS summons was issued for an improper purpose, but offers no evidence in support of that allegation, a district court should have discretion not to hold an evidentiary hearing. Such a rule—adopted in nearly every court of appeals, see pp. 15-16, *infra*—is consistent with the longstanding principle that "[e]very public officer is presumed to act in obedience to his duty, until the contrary is shown." *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19, 33 (1827). "The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926); see *United States Postal Serv.* v. *Gregory*, 534 U.S. 1, 10 (2001). Courts therefore may not infer wrongdoing on the part of a government official based on a mere allegation of improper motive.

Even when an allegation of improper motive is ultimately rejected on the merits, protracted inquiry

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Fine Arts, Inc. v. *United States*, 469 U.S. 310 (1985), however, the Court noted that "it was well within [a] District Court's discretion to conclude, after reviewing the submissions of the parties" alleging that summonses were issued for an improper purpose "and holding oral argument, that an evidentiary hearing on the question of enforcement was unnecessary." *Id.* at 324 n.7. The Court explained that "the burden of showing an abuse of the court's process is on the taxpayer," *ibid.* (quoting *Donaldson*, 400 U.S. at 527), and it concluded that the allegation of improper purpose, "[e]ven if factually true, * * * did not provide a basis for quashing the summonses," *ibid.* As the United States argued in the court of appeals, see Gov't C.A. Br. 23-45, the same is true here because respondents' allegations, even if substantiated, would not provide a basis for quashing the summonses at issue.

into that charge may impede the effective conduct of the government's business. For that reason, this Court observed in a related context that "[t]he justifications for a rigorous standard for the elements of a selective-prosecution claim * * * require a correspondingly rigorous standard for discovery in aid of such a claim." *United States* v. *Armstrong*, 517 U.S. 456, 468 (1996). Although the court of appeals in this case held that respondents were "not entitled to discovery," App., *infra*, 5a n.3, it required the district court to convene an evidentiary hearing at which respondents will be allowed to question IRS officials regarding their motives for issuing the summonses at issue here. To treat unsupported allegations of improper motive as triggering such a requirement cannot be reconciled with the presumption of regularity.

B. The Court Of Appeals' Decision Conflicts With Decisions Of Every Other Court Of Appeals With Jurisdiction Over IRS Summons Actions

1. The court of appeals' decision conflicts with decisions of the eleven other courts of appeals that exercise jurisdiction over summons-enforcement actions. In each of those circuits, a district court has discretion not to hold an evidentiary hearing to inquire into the IRS's motive for issuing a summons if a summons opponent produces only a bare allegation of bad faith. See *United States* v. *Judicial Watch, Inc.*, 371 F.3d 824, 830-831 (D.C. Cir. 2004); *Sugarloaf Funding, LLC* v. *U.S. Dep't of the Treasury*, 584 F.3d 340, 350-351 (1st Cir. 2009); *United States* v. *Tiffany Fine Arts, Inc.*, 718 F.2d 7, 14 (2d Cir. 1983), aff'd, 469 U.S. 310 (1985); *United States* v. *Garden State Nat'l Bank*, 607 F.2d 61, 71 (3d Cir. 1979); *Hintze* v. *I.R.S.*, 879 F.2d 121, 126-127 (4th Cir. 1989), overruled on other

grounds by *Church of Scientology* v. *United States*, 506 U.S. 9 (1992); *Zugerese Trading LLC* v. *IRS*, 336 Fed. Appx. 416, 419 (5th Cir. 2009); *Phillips* v. *United States*, No. 98-3128, 1999 WL 228585, at *4 (6th Cir. Mar. 10, 1999); *Kis*, 658 F.2d at 539-540 (7th Cir.); *United States* v. *National Bank*, 622 F.2d 365, 367 (8th Cir. 1980); *Fortney* v. *United States*, 59 F.3d 117, 121 (9th Cir. 1995); *United States* v. *Balanced Fin. Mgmt., Inc.*, 769 F.2d 1440, 1444-1445 (10th Cir. 1985). That lopsided and intractable circuit conflict is a sufficient reason to grant the petition for a writ of certiorari.

As the Seventh Circuit has explained, Congress's "concern that summons enforcement proceedings be concluded rapidly, while at the same time the taxpayer is protected from summonses that may be an abuse of process," is best implemented by requiring a summons objector to "develop facts from which a court might *infer* a *possibility* of some wrongful conduct by the Government" before the objector is entitled to an evidentiary hearing. *Kis*, 658 F.2d at 540. To be sure, a taxpayer need not develop evidence sufficient to *prove* that the IRS has issued a summons for an improper purpose. But if a taxpayer cannot develop sufficient evidence from which at least an inference of possible wrongdoing might arise, "then an evidentiary hearing would be a waste of judicial time and resources," and a district court should have discretion not to indulge such a waste. *Ibid.*

Courts of appeals have differed in their articulations of the standard that a summons objector must satisfy to be entitled to an evidentiary hearing to explore the IRS's purpose for issuing a summons. For example, the Eighth Circuit requires a summons op-

ponent to show "substantial deficiencies in the summons proceedings," *National Bank*, 622 F.2d at 367; the Fourth Circuit requires an objector to produce "some substantive evidence corroborating the claim of abuse," *Hintze*, 879 F.2d at 127; and the Second Circuit requires a taxpayer to make a "substantial preliminary showing of an alleged abuse," *Tiffany*, 718 F.2d at 14 (quoting *United States* v. *Morgan Guar. Trust Co.*, 572 F.2d 36, 42-43 n.9 (2d Cir.), cert. denied, 439 U.S. 822 (1978)). But every court of appeals except the Eleventh Circuit agrees that a district court has discretion not to hold an evidentiary hearing based only on a bare allegation of improper purpose.

2. The division between the Eleventh Circuit and every other court of appeals is unlikely to be resolved without this Court's intervention. On June 10, 2009, a panel of the Eleventh Circuit issued its decision in *Nero Trading, LLC* v. *U.S. Dep't of Treasury*, 570 F.3d 1244. The panel in *Nero Trading* held that a summons opponent "is entitled to a limited adversarial hearing in order to ascertain whether the Service issued a given summons for an improper purpose," *id.* at 1249, and that "an allegation of improper purpose is sufficient to trigger a limited adversary hearing where the taxpayer may question IRS officials concerning the Service's reasons for issuing the summons," *ibid.* (quoting *United States* v. *Southeast First Nat'l Bank*, 655 F.2d 661 (5th Cir. 1981)). The panel in *Nero* recognized that its "precedent in this area is not in accord with that of a number of our sister circuits." *Ibid.* The panel was "convinced," however, "that *Southeast First National Bank*'s considered review of our earlier line of cases in this area strikes the appropriate balance between honoring the intended summary

nature of the summons proceeding and protecting the interests of the taxpayer." *Id.* at 1250.[3]

On June 18, 2009, eight days after the panel decision in *Nero Trading*, the Fifth Circuit held that a district court *does* have discretion to deny a request for an evidentiary hearing when a taxpayer alleges that the IRS issued a summons for an improper purpose. *Zugerese Trading LLC*, 336 Fed. Appx. at 419; see *Mazurek* v. *United States*, 271 F.3d 226, 234 (5th Cir. 2001) (noting that the "availability of a hearing on a motion to quash a summons is left to the sound discretion of the district court"). The government filed a petition for rehearing en banc in *Nero Trading*, which brought to the Eleventh Circuit's attention the intervening decision in *Zugerese*. See Gov't Pet. for Reh'g, *Nero Trading*, at 7. Despite that development and the acknowledged conflict with decisions of other courts of appeals, the Eleventh Circuit in *Nero Trading* denied rehearing en banc without recorded dissent. See Order, No. 08-12053, (11th Cir. Oct. 5, 2009). In the present case, the court of appeals relied on both *Nero*

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[3] The Fifth Circuit's 1981 decision in *Southeast First National Bank* is binding precedent in the Eleventh Circuit. See *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc). *Southeast First National Bank* was decided before the enactment of TEFRA, at a time when the propriety of an IRS summons depended in part on whether the Service had made an "institutional commitment" to refer the taxpayer to the Justice Department for possible criminal prosecution. See pp. 12-13, *supra*. The taxpayer in *Southeast First National Bank* alleged "that the sole objective of the IRS' investigation was to gather evidence for a criminal prosecution." 655 F.2d at 665. TEFRA has since replaced the prior "institutional commitment" inquiry with an objective standard that turns on whether an actual referral has been made. See pp. 12-13, *supra*.

Trading and *Southeast First National Bank* in holding that, "[u]nder our precedents, [petitioners] were entitled to a hearing to explore their allegation of an improper purpose." App., *infra*, 5a. In light of that sequence of events, there is no reasonable prospect that the present circuit conflict will be resolved without this Court's intervention.

C. The Question Presented Is Recurring And Important

If left uncorrected, the Eleventh Circuit's decision is likely to have a recurring detrimental effect on the IRS's efficient enforcement of federal tax laws. In order to fulfill its duty to inquire into, determine, and assess tax liabilities throughout the country, the IRS issues thousands of summonses every year, including hundreds in the Eleventh Circuit. Although district courts are not called upon to enforce every summons the IRS issues, they adjudicate a significant number of requests to enforce (or to quash) IRS summonses every year. Under the Eleventh Circuit's rule, a taxpayer is virtually guaranteed the ability to delay the resolution of such proceedings merely by alleging that the summons was issued for an improper purpose. Such delays could be particularly problematic in international investigations where the Eleventh Circuit's rule could make it difficult for the IRS to respond in a timely manner to requests that it issue summonses to obtain information for United States tax-treaty partners.

In *Nero Trading*, the Eleventh Circuit expressed the view that its approach "strikes the appropriate balance between honoring the intended summary nature of the summons proceeding and protecting the interests of the taxpayer." 570 F.3d at 1250. This Court has "recognize[d] that the authority vested in

tax collectors may be abused, as all power is subject to abuse." *Bisceglia*, 420 U.S. at 146. The Court has explained, however, that "the solution is not to restrict that authority so as to undermine the efficacy of the federal tax system, which seeks to assure that taxpayers pay what Congress has mandated and to prevent dishonest persons from escaping taxation thus shifting heavier burdens to honest taxpayers." *Ibid.* District courts already protect taxpayers against abusive summons practices by requiring the IRS to establish (by demonstrating the *Powell* factors) that it is pursuing a summons in good faith. And if there is reason to believe, notwithstanding the IRS's representation that it has satisfied the *Powell* factors, that a summons was issued for an improper purpose, a district court has discretion to hold an evidentiary hearing. Going further and requiring a hearing any time the recipient of a summons merely alleges bad faith, by contrast, subverts the presumption of regularity of government action and thereby distorts the balance that Congress sought to strike.

The efficient collection of internal revenue taxes authorized by statute is vital to the Nation's well-being. Congress has required taxpayers "to disclose honestly all information relevant to tax liability." *Bisceglia*, 420 U.S. at 145. Although most taxpayers discharge that duty with "good faith and integrity * * * , it would be naive to ignore the reality that some persons attempt to outwit the system, and tax evaders are not readily identifiable." *Ibid.* Congress has charged the IRS with endeavoring to identify delinquent taxpayers and has endowed the Service

with broad investigatory powers to that end. *Id.* at 145-146; see *Arthur Young & Co.*, 465 U.S. at 815-816.[4]

This Court has been appropriately loath to complicate summons-enforcement proceedings in a way that would "stultify the Service's every investigatory move" or "thwart and defeat the appropriate investigatory powers that the Congress has placed in 'the Secretary or his delegate.'" *Donaldson*, 400 U.S. at 531, 533. The aberrant rule applied by the Eleventh Circuit in this case disserves the intent of Congress and should not be allowed to stand.

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[4] This Court has recognized that the IRS's broad investigatory authority is not *sui generis* in our federal system but is similar to other investigatory powers such as those of the Federal Trade Commission and the Department of Labor. *Bisceglia*, 420 U.S. at 147-148; see *Church of Scientology*, 506 U.S. at 16 n.10. The Court has also noted that "the language of § 7602 suggests an intention to codify a broad testimonial obligation" that has its source in the common law. *Euge*, 444 U.S. at 714.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2013

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

12-13190

9:11-mc-80456-KLR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF BEEKMAN VISTA, INC., DYNAMO HOLDINGS LIMITED PARTNERSHIP, DEFENDANTS-APPELLANTS

9:11-mc-80457-KLR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DYNAMO HOLDINGS LIMITED PARTNERSHIP, INTERVENOR PLAINTIFF-APPELLANT

MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF DYNAMO GP, INC., AS GENERAL PARTNER OF DYNAMO HOLDINGS LIMITED PARTNERSHIP, DEFENDANT-APPELLANT

9:11-mc-80459-KLR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DYNAMO HOLDINGS LIMITED PARTNERSHIP, INTERVENOR PLAINTIFF-APPELLANT

RITA HOLLOWAY, AS TRUSTEE FOR THE 2005 CHRISTINE MOOG FAMILY DELAWARE DYNASTY TRUST, DEFENDANT

9:11-mc-80460-KLR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MARC JULIEN, AS TRUSTEE FOR THE 2005 ROBERT JULIEN DELAWARE DYNASTY TRUST, DEFENDANT

DYNAMO HOLDINGS LIMITED PARTNERSHIP, INTERVENOR DEFENDANT-APPELLANT

9:11-mc-80461-KLR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ROBERT JULIEN, DEFENDANT-APPELLANT

DYNAMO HOLDINGS LIMITED PARTNERSHIP, INTERVENOR DEFENDANT-APPELLANT

Filed: Apr. 18, 2013

Appeal from the United States District Court
for the Southern District of Florida

Before: MARCUS, BLACK and SILER,* Circuit Judges.

PER CURIAM:

* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

This case involves the Internal Revenue Service's (IRS) issuance of five administrative summonses, pursuant to 26 U.S.C. § 7602, during an investigation into the tax liabilities of Dynamo Holdings Limited Partnership (Dynamo). Specifically, (1) Michael Clarke, in his capacity as the chief financial officer of Beekman Vista, Inc., and Dynamo GP, Inc.; (2) Robert Julien; and (3) Dynamo (collectively Appellants) appeal the district court's orders granting the IRS's petitions to enforce the summonses. After careful review of the record, and having had the benefit of oral argument, we vacate the district court's order enforcing the summonses and remand for the district court to hold a hearing.

To obtain enforcement of a summons, the IRS must make a four-part prima facie showing that (1) "the investigation will be conducted pursuant to a legitimate purpose," (2) "the inquiry may be relevant to the purpose," (3) "the information sought is not already within the Commissioner's possession," and (4) "the administrative steps required by the Code have been followed." *United States v. Powell*, 379 U.S. 48, 57-58, 85 S. Ct. 248, 13 L. Ed. 2d 112 (1964); *see also Nero Trading, LLC v. U.S. Dep't of Treasury, IRS*, 570 F.3d 1244, 1248 (11th Cir. 2009). Once the IRS makes its prima facie showing, the burden shifts to the party opposing the summons to either (1) disprove one of the four elements of the IRS's prima facie case, or (2) "convince the court that enforcement of the summons would constitute an abuse of the court's process." *Nero*, 570 F.3d at 1249 (internal quotation omitted). The Supreme Court has stated that because the dis-

trict court's process is used to enforce a summons, the court should not permit its process to be abused by enforcing a summons that was issued for an improper purpose. *See Powell*, 379 U.S. at 58, 85 S. Ct. 248. According to the *Powell* Court, an improper purpose may include any purpose "reflecting on the good faith of the particular investigation." *Id.*

In *Powell*, the Supreme Court also explained that a party opposing a summons is entitled to an adversary hearing before enforcement is ordered, and that, at the hearing, the opponent "may challenge the summons on any appropriate ground." *Id.* (internal quotation omitted). Subsequently, in *United States v. Southeast First National Bank of Miami Springs*, we held that "an allegation of improper purpose is sufficient to trigger a limited adversary hearing where the taxpayer may question IRS officials concerning the Service's reasons for issuing the summons." 655 F.2d 661, 667 (5th Cir. 1981) (footnote omitted).[1] More recently, we have reaffirmed *Southeast First National Bank*, calling it "the legitimate offspring of the Supreme Court's seminal decision in *Powell*." *Nero*, 570 F.3d at 1249.

Appellants contend they were entitled to discovery and an evidentiary hearing before the district court granted the IRS's petitions to enforce the summonses because they alleged the IRS may have issued and sought to enforce the summonses for at least four

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[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

improper purposes.[2] One of the reasons the IRS may have issued the summonses, according to Appellants, was solely in retribution for Dynamo's refusal to extend a statute of limitations deadline. Although Appellants raised the possibility of numerous improper purposes, federal pleading standards allow claims and defenses to be pled in the alternative, and do not require them to be consistent. *See* Fed. R. Civ. P. 8(d)(2) & (d)(3). If the IRS issued the summonses only to retaliate against Dynamo, that purpose "reflect[s] on the good faith of the particular investigation," and would be improper. *See Powell*, 379 U.S. at 58, 85 S. Ct. 248.

Under our precedents, Appellants were entitled to a hearing to explore their allegation of an improper purpose.[3] As we have explained, in situations such as this, requiring the taxpayer to provide factual support for an allegation of an improper purpose, without giving the taxpayer a meaningful opportunity to obtain such facts, saddles the taxpayer with an unreasonable circular burden, creating an impermissible "Catch 22." *See Nero*, 570 F.3d at 1250; *S.E. First Nat'l Bank*, 655 F.2d at 667. While "the scope of any adversarial

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[2] We will not reverse a district court's order enforcing an IRS summons unless it is clearly erroneous. *Nero*, 570 F.3d at 1248. In addition, we review the denial of discovery and an evidentiary hearing for abuse of discretion. *Id.*

[3] Appellants, however, are not entitled to discovery. We have held that the full "panoply of expensive and time-consuming pretrial discovery devices may not be resorted to as a matter of course and on a mere allegation of improper purpose." *Nero*, 570 F.3d at 1249 (internal quotation and emphasis omitted).

hearing in this area is left to the discretion of the district court," binding Circuit authority requires that Appellants be given an opportunity "to ascertain whether the Service issued a given summons for an improper purpose." *Nero*, 570 F.3d at 1249. As required by *Southeast First National Bank*, on remand Appellants should be permitted to "question IRS officials concerning the Service's reasons for issuing the summons[es]." 655 F.2d at 667 (footnote omitted).

VACATED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 12-13190

District Court Docket No. 9:11-mc-80456-KLR

9:11-mc-80456-KLR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF BEEKMAN VISTA, INC., DYNAMO HOLDINGS LIMITED PARTNERSHIP, DEFENDANTS-APPELLANTS

9:11-mc-80457-KLR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DYNAMO HOLDINGS LIMITED PARTNERSHIP, INTERVENOR PLAINTIFF-APPELLANT

MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF DYNAMO GP, INC., AS GENERAL PARTNER OF DYNAMO HOLDINGS LIMITED PARTNERSHIP, DEFENDANT-APPELLANT

9:11-mc-80459-KLR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DYNAMO HOLDINGS LIMITED PARTNERSHIP, INTERVENOR PLAINTIFF-APPELLANT

RITA HOLLOWAY, AS TRUSTEE FOR THE 2005 CHRISTINE MOOG FAMILY DELAWARE DYNASTY TRUST, DEFENDANT

9:11-mc-80460-KLR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MARC JULIEN, AS TRUSTEE FOR THE 2005 ROBERT JULIEN DELAWARE DYNASTY TRUST, DEFENDANT

DYNAMO HOLDINGS LIMITED PARTNERSHIP, INTERVENOR DEFENDANT-APPELLANT

9:11-mc-80461-KLR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ROBERT JULIEN, DEFENDANT-APPELLANT

DYNAMO HOLDINGS LIMITED PARTNERSHIP, INTERVENOR DEFENDANT-APPELLANT

Entered: Apr. 18, 2013

Appeal from the United States District Court
for the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of the Court.

For the Court: John Ley, Clerk of Court
By: Djuanna Clark

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 11-80456-MC

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF BEEKMAN VISTA, INC., RESPONDENT

Filed: Apr. 17, 2012

ORDER GRANTING PETITION TO ENFORCE INTERNAL REVENUE SUMMONS AND DENYING MOTION FOR SUMMARY DISMISSAL

KENNETH L. RYSKAMP, District Judge.

THIS CAUSE comes before the Court pursuant to the petition to enforce Internal Revenue Summons, filed April 28, 2011 [**DE 1**]. The Court issued an order requiring a response to the summons on June 14, 2011 [**DE 4**]. Respondent answered the summons on July 18, 2011 [**DE 7**], and the government replied on July 29, 2011 [**DE 9**]. The Court granted Dynamo Holdings Limited Partnership's ("DHLP") motion to intervene on August 30, 2011 [**DE 15**], and DHLP filed its answer, which adopted Respondent's response, on

September 6, 2011 [DE 16]. On October 19, 2011 [DE 20], Respondent and DHLP moved for summary dismissal or for scheduling of a pretrial conference. The government responded on November 7, 2011 [DE 21], and Respondent and DHLP replied on November 17, 2011 [DE 22]. This matter is ripe for adjudication.

According to the petition, Internal Revenue Agent Mary Fierfelder and the Internal Revenue Service have examined the tax returns of DHLP for the years ending December 31, 2005, December 31, 2006, and December 31, 2007. During the exam, issues arose with respect to debt that DHLP reported on its returns, including DHLP's questionable interest expenses in the amount of $17,000,000 in both 2006 and 2007. The summons seeks testimony and records that Mr. Clarke may have regarding the tax reporting obligations of DHLP and deductions it has claimed.

As part of her investigation, on September 24, 2010, Agent Fierfelder issued an administrative summons (Form 2039) directing Mr. Clarke to appear before her on October 25, 2010, to give testimony and to produce for examination certain books, records, papers or other data, as described in the summons. Agent Fierfelder served the summons on Mr. Clarke in accordance with 26 U.S.C. § 7603 by handing a copy of the summons to him on September 28, 2010. On September 28, 2010, Agent Fierfelder served notice required by 26 U.S.C. § 7609(a) on the persons entitled to notice according to Exhibit B of the summons, by sending it by certified mail, as evidenced in the certificate of service on the reverse side of the summons. On October 25, 2010,

Mr. Clarke did not appear, and to date, Mr. Clarke has not produced any material or provided any testimony as sought in the summons.

As a result of the examination, the IRS issued a "Notice of Final Partnership Administrative Adjustment," ("FPAA") on December 28, 2010. On February 1, 2011, DHLP filed in the United States Tax Court a "Petition for Readjustment of Partnership Items Under Code Section 6226," assigned Docket number 2685-11, (the "Tax Court Petition"), challenging the determinations made by the Government in the FPAA. Thereafter, this proceeding was commenced to enforce the Summons in issue.

The government asserts that the information sought is in the possession, custody, or control of Mr. Clarke and is not already in the possession of the Internal Revenue Service. The government asserts that the information sought may be relevant to the determination of the correctness of the federal tax reporting by DHLP for the tax years ending December 31, 2005, December 31, 2006, and December 31, 2007. The government also asserts that there is no Department of Justice referral, as defined in 26 U.S.C. § 7602(d)(2), in effect with respect to DHLP for the tax years covered by the summons. Further, the government asserts that all administrative steps for the issuance of the summonses have been followed and the summons has not been issued for any improper purpose.

To obtain enforcement of a summons, the government must establish that the summons is issued for a

legitimate purpose, seeks information relevant to that purpose, seeks information that is not already in the IRS's possession, and that the summons satisfies all administrative steps required by the Internal Revenue Code. *United States v. Powell*, 379 U.S. 48, 57-58, 85 S. Ct. 248, 13 L. Ed. 2d 112 (1964).

Accordingly, on June 14, 2011, the Court required Mr. Clarke to file a written response stating why he should not comply with the summons.

The Response fails to rebut the government's prima facie case. The Response discusses the Tax Court proceedings referenced above. But the fact that DHLP is challenging the FPAA in Tax Court is irrelevant since the subsequent initiation of a Tax Court proceeding has no effect on the summons enforcement process.

The Response contends that the government has possession of certain unspecified documents and information requested by the summons. That Response also alleges that the government has all the information it needs analyze the tax reporting obligations of DHLP. Yet Respondent does not deny that he has not provided all the documents and provided the testimony requested by the summons, and she has offered no facts or evidence to contradict Revenue Agent Fierfelder's Declaration that the government does not possess the documents sought.

The Response contends that the government may not establish a prima facie case through a declaration by a revenue agent. That position is baseless. *See United States v. Morse*, 532 F.3d 1130, 1132 (11th Cir.

2008) (stating that a sworn affidavit of the agent who issued the summons is sufficient to demonstrate a prima facie case). The response also asserts that the Declaration of the Revenue Agent is unsworn, but the Declaration states it was made pursuant to 28 U.S.C. § 1746, which treats such declaration as having the same force and effect as a sworn declaration. Moreover, the Declaration was made pursuant to penalties of perjury.

The Respondent's affirmative defenses also fail. The Response first alleges that the government is engaged in an improper second examination of another taxpayer, Beekman Vista, Inc., and that information obtained through the summons might be used in the Beekman examination. The government has established a prima facie case that it has a legitimate need for the information sought by the summons to investigate DHLP. That there might be an additional use of the information does not render an otherwise enforceable summons unenforceable. *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 324, 105 S. Ct. 725, 83 L. Ed. 2d 678 (1985).

The second ground offered for not enforcing the summons is that the government is displeased that DHLP declined to extend its statute of limitations period. This is mere conjecture unsupported by evidence. Establishing an improper purpose requires more than a naked assertion. *United States v. Millman*, 765 F.2d 27, 29 (2d Cir. 1985) (holding that a taxpayer must make "a substantial preliminary showing" that the IRS has abused its summons power)

(quoting *Tiffany Fine Arts, Inc.*, 718 F.2d 7, 14 (2d Cir. 1983), *aff'd* 469 U.S. 310, 105 S. Ct. 725, 83 L. Ed. 2d 678 (1985)). Even if the IRS were displeased, such has no bearing on whether the issuance of a summons for information that is clearly relevant to the issues being examined was improper.

The Response's third grounds against enforcement of the summons is that the government's power to enforce a summons terminates when a taxpayer petitions the Tax Court because this might allow the government to obtain more information than it could by the Tax Court's discovery tools alone. The Response is incorrect as a matter of law. The government's power to enforce a summons does not terminate merely because a statutory notice of deficiency or FPAA has been issued and a Tax Court proceeding has begun. *PAA Mgmt., Ltd. v. United States*, 962 F.2d 212, 219 (2nd Cir. 1992). The validity of a summons is tested as of the date of issuance. Events occurring after the date of issuance, but before enforcement, should not affect enforceability. *See United States v. Centennial Builders, Inc.*, 747 F.2d 678, 681, n.1 (11th Cir. 1984).

The Response's fourth ground for non-enforcement of the summons is comity. The respondent posits that comity requires the Tax Court, which currently has DHLP's partnership proceeding, take over the instant summons enforcement proceeding because the two proceedings are the same. Contrary to the Response's assertion, the District Court and the Tax Court are not presented with the same lawsuit. The instant case involves the enforcement of a summons under section

7604 of the Internal Revenue Code ("IRC"). The Tax Court proceeding involves a challenge to the adjustments to DHLP's partnership items under IRC § 6226. The Tax Court does not have jurisdiction to consider summons enforcement proceedings, IRC § 7604(a); *Ash v. Comm'r*, 96 T.C. 459, 462, 1991 WL 30196 (1991), and the district court, in a summons enforcement proceeding, does not have jurisdiction to consider the FPAA adjustments to DHLP's tax reporting. *Morse*, 532 F.3d at 1132 (holding a court in a summons enforcement proceeding does not have authority over the validity of a tax assessment).

Respondent also maintains that DHLP's statute of limitations period for the years covered by the FPAA has expired, and that this would prevent the Summons from being enforceable. The Response offers no authority for its position. The factual premise regarding DHLP's statute of limitations period is incorrect. The statute of limitations period for the DHLP tax years covered by the FPAA remains open. As noted in the Second Affirmative Defense, the IRS issued the FPAA prior to the close of the statute of limitations period. The period for making an assessment is extended under IRC § 6229(d) for one year after the conclusion of the Tax Court proceeding, which is ongoing.

Respondent also argues that the Summons should not be enforced because "the Government" told an attorney for DHLP that the government would not enforce the Summons if a petition was filed with the Tax Court. This allegation is nothing more than a

bald assertion unsupported by any credible evidence. Unsupported allegations are insufficient to rebut the government's prima facie case.

Arguing that he has raised "in a substantial way the existence of substantial deficiencies in the summons proceedings," Respondent demands discovery and a hearing. In support of this request, he cites *United States v. Southeast First National Bank of Miami Springs*, 655 F.2d 661 (5th Cir. 1981). This case was relied upon in *Nero Trading LLC v. United States*, 570 F.3d 1244, 1249 (11th Cir. 2009), which allowed a limited adversarial hearing to provide the taxpayer with a meaningful opportunity "to challenge the summons on any appropriate grounds," but may be limited as long as the court does not deny the taxpayer "his sole means of demonstrating the truth (or falsity) of his allegations." *Nero*, 570 F.3d at 1249 & n.3. Providing an adversarial hearing does not require an evidentiary hearing. *See Tiffany Fine Arts*, 469 U.S. at 324, n.7 (holding that district court did not abuse its discretion in determining "that an evidentiary hearing on the question of enforcement was unnecessary"). Significantly, the Eleventh Circuit faulted the district court in Nero for inadequately explaining its decision not to hold an evidentiary hearing, not for failing to hold one. *Nero*, 570 F.3d at 1250. *Nero* should not be read to require an evidentiary hearing upon a mere allegation of improper purpose. In *Tiffany Fine Arts*, the Supreme Court upheld the denial of an evidentiary hearing in a summons enforcement proceeding under similar circumstances and emphasized that "the burden of showing an abuse of the court's process is on the tax-

payer." 469 U.S. at 324 n.7 ("We also find that it was well within the District Court's discretion to conclude, after reviewing the submissions of the parties and holding oral argument, that an evidentiary hearing on the question of enforcement was unnecessary."). Here, the respondent has made no meaningful allegations of improper purpose which warrant the Court allowing discovery into and a hearing on the allegations raised in the Response. The Court will deny Respondent access to discovery and will not hold an evidentiary hearing.

Respondent also moves for summary dismissal or for scheduling of a pretrial conference. Respondent's motion in this regard largely reiterates the arguments set forth in response to the summons. Respondent makes two new arguments, however. First, he suggests that the issuance of the summons may have violated the intent of the Internal Revenue Manual (IRM). Second, he suggests that this Court should adopt a rule that enforcement of a summons issued pursuant to 26 U.S.C. § 7602 before Tax Court litigation is commenced should be limited in the same manner as discovery under Bankruptcy Rule 2004 is limited once litigation between the parties has commenced.

Respondent does not actually allege that the IRM guidelines on issuing summonses were violated, since he acknowledges that the summons was issued *before* the FPAA was issued or the Tax Court proceedings begun, as the IRM permits. Nevertheless, Respondent deems suspicious the timing of the enforcement

proceedings relative to the issuance of the FPAA and the initiation of the Tax Court case. Respondent offers no evidence to support his suspicions that this enforcement proceeding violates the IRM's proscription on issuance of a post-FPAA summons. Even if he could offer evidence to that effect, the IRM itself confers no rights on Clarke here. *Matthews v. Commissioner*, T.C. Memo. 2008-126, 2008 WL 1946817, at *11 (U.S. Tax Ct. 2008) ("Initially, we note the well-settled principle that the Internal Revenue Manual does not have the force of law, is not binding on the IRS, and confers no rights on taxpayers.").

Respondent also asks the Court to create a new rule that bars summons enforcement once a Tax Court case or other litigation is commenced that concerns the subject of the summons. As noted, the government's power to enforce a summons does not terminate merely because a statutory notice of deficiency or final partnership administrative adjustment has been issued and a Tax Court proceeding has begun. It is hereby

ORDERED AND ADJUDGED that the petition to enforce Internal Revenue Summons, filed April 28, 2011 [DE 1], is GRANTED. It is further

ORDERED AND ADJUDGED that the motion for summary dismissal and for a pretrial conference, filed October 19, 2011 [DE 20], is DENIED. The Clerk of Court shall CLOSE this case and DENY any pending motions as MOOT.

DONE AND ORDERED at Chambers in West Palm Beach, Florida, this 16th day of April, 2012.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 11-80457-MC-RYSKAMP/VITUNAC

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF DYNAMO GP, INC., AS GENERAL PARTNER OF DYNAMO HOLDINGS LIMITED PARTNERSHIP, RESPONDENT

[Filed: Apr. 16, 2012]

ORDER GRANTING PETITION TO ENFORCE INTERNAL REVENUE SUMMONS AND DENYING MOTION FOR SUMMARY DISMISSAL

THIS CAUSE comes before the Court pursuant to the petition to enforce Internal Revenue Summons, filed April 28, 2011 [DE 1]. The Court issued an order requiring a response to the summons on June 14, 2011 [DE 4]. Respondent answered the summons on July 18, 2011 [DE 7], and the government replied on July 29, 2011 [DE 9]. The Court granted Dynamo Holdings Limited Partnership's ("DHLP") motion to intervene on August 30, 2011 [DE 15], and DHLP filed its answer, which adopted Respondent's response, on September 6, 2011 [DE 16]. On October 19, 2011 [DE

20], Respondent and DHLP moved for summary dismissal or for scheduling of a pretrial conference. The government responded on November 7, 2011 [DE 21], and Respondent and DHLP replied on November 17, 2011 [DE 22]. This matter is ripe for adjudication.

According to the petition, Internal Revenue Agent Mary Fierfelder and the Internal Revenue Service have examined the tax returns of DHLP for the years ending December 31, 2005, December 31, 2006, and December 31, 2007. During the exam, issues arose with respect to debt that DHLP reported on its returns, including DHLP's questionable interest expenses in the amount of $17,000,000 in both 2006 and 2007. The summons seeks testimony and records that Mr. Clarke may have regarding the tax reporting obligations of DHLP and deductions it has claimed.

As part of her investigation, on September 24, 2010, Agent Fierfelder issued an administrative summons (Form 2039) directing Mr. Clarke to appear before her on October 25, 2010, to give testimony and to produce for examination certain books, records, papers or other data, as described in the summons. Agent Fierfelder served the summons on Mr. Clarke in accordance with 26 U.S.C. § 7603 by handing a copy of the summons to him on September 28, 2010. On September 28, 2010, Agent Fierfelder served notice required by 26 U.S.C. § 7609(a) on the persons entitled to notice according to Exhibit B of the summons, by sending it by certified mail, as evidenced in the certificate of service on the reverse side of the summons. On October 25, 2010, Mr. Clarke did not appear, and to date, Mr. Clarke has

not produced any material or provided any testimony as sought in the summons.

As a result of the examination, the IRS issued a "Notice of Final Partnership Administrative Adjustment," ("FPAA") on December 28, 2010. On February 1, 2011, DHLP filed in the United States Tax Court a "Petition for Readjustment of Partnership Items Under Code Section 6226," assigned Docket number 2685-11, (the "Tax Court Petition"), challenging the determinations made by the Government in the FPAA. Thereafter, this proceeding was commenced to enforce the Summons in issue. The government asserts that the information sought is in the possession, custody, or control of Mr. Clarke and is not already in the possession of the Internal Revenue Service.

The government asserts that the information sought may be relevant to the determination of the correctness of the federal tax reporting by DHLP for the tax years ending December 31, 2005, December 31, 2006, and December 31, 2007. The government also asserts that there is no Department of Justice referral, as defined in 26 U.S.C. § 7602(d)(2), in effect with respect to DHLP for the tax years covered by the summons. Further, the government asserts that all administrative steps for the issuance of the summonses have been followed and the summons has not been issued for any improper purpose.

To obtain enforcement of a summons, the government must establish that the summons is issued for a legitimate purpose, seeks information relevant to that

purpose, seeks information that is not already in the IRS's possession, and that the summons satisfies all administrative steps required by the Internal Revenue Code. *United States v. Powell*, 379 U.S. 48, 57-58, 85 S. Ct. 248, 13 L. Ed. 2d 112 (1964).

Accordingly, on June 14, 2011, the Court required Mr. Clarke to file a written response stating why he should not comply with the summons.

The Response fails to rebut the government's prima facie case. The Response discusses the Tax Court proceedings referenced above. But the fact that DHLP is challenging the FPAA in Tax Court is irrelevant since the subsequent initiation of a Tax Court proceeding has no effect on the summons enforcement process.

The Response contends that the government has possession of certain unspecified documents and information requested by the summons. That Response also alleges that the government has all the information it needs analyze the tax reporting obligations of DHLP. Yet Respondent does not deny that he has not provided all the documents and provided the testimony requested by the summons, and she has offered no facts or evidence to contradict Revenue Agent Fierfelder's Declaration that the government does not possess the documents sought.

The Response contends that the government may not establish a prima facie case through a declaration by a revenue agent. That position is baseless. *See United States v. Morse*, 532 F.3d 1130, 1132 (11th Cir. 2008) (stating that a sworn affidavit of the agent who

issued the summons is sufficient to demonstrate a prima facie case). The response also asserts that the Declaration of the Revenue Agent is unsworn, but the Declaration states it was made pursuant to 28 U.S.C. § 1746, which treats such declaration as having the same force and effect as a sworn declaration. Moreover, the Declaration was made pursuant to penalties of perjury.

The Respondent's affirmative defenses also fail. The Response first alleges that the government is engaged in an improper second examination of another taxpayer, Beekman Vista, Inc. and that information obtained through the summons might be used in the Beekman examination. The government has established a prima facie case that it has a legitimate need for the information sought by the summons to investigate DHLP. That there might be an additional use of the information does not render an otherwise enforceable summons unenforceable. *Tiffany Fine Arts, Inc. v. United States,* 469 U.S. 310, 324, 105 S. Ct. 725, 83 L. Ed. 2d 678 (1985).

The second ground offered for not enforcing the summons is that the government is displeased that DHLP declined to extend its statute of limitations period. This is mere conjecture unsupported by evidence. Establishing an improper purpose requires more than a naked assertion. *United States v. Millman,* 765 F.2d 27, 29 (2d Cir.1985) (holding that a taxpayer must make "a substantial preliminary showing" that the IRS has abused its summons power) (quoting *Tiffany Fine Arts, Inc.* 718 F.2d 7, 14 (2d Cir. 1983),

aff'd 469 U.S. 310, 105 S. Ct. 725, 83 L. Ed. 2d 678 (1985)). Even if the IRS were displeased, such has no bearing on whether the issuance of a summons for information that is clearly relevant to the issues being examined was improper.

The Response's third grounds against enforcement of the summons is that the government's power to enforce a summons terminates when a taxpayer petitions the Tax Court because this might allow the government to obtain more information than it could by the Tax Court's discovery tools alone. The Response is incorrect as a matter of law. The government's power to enforce a summons does not terminate merely because a statutory notice of deficiency or FPAA has been issued and a Tax Court proceeding has begun. *PAA Mgmt. Ltd. v. United States*, 962 F.2d 212, 219 (2nd Cir. 1992). The validity of a summons is tested as of the date of issuance. Events occurring after the date of issuance, but before enforcement, should not affect enforceability. *See United States v. Centennial Builders, Inc.* 747 F.2d 678, 681, n.1 (11th Cir. 1984).

The Response's fourth ground for non-enforcement of the summons is comity. The respondent posits that comity requires the Tax Court, which currently has DHLP's partnership proceeding, take over the instant summons enforcement proceeding because the two proceedings are the same. Contrary to the Response's assertion, the District Court and the Tax Court are not presented with the same lawsuit. The instant case involves the enforcement of a summons

under section 7604 of the Internal Revenue Code ("IRC"). The Tax Court proceeding involves a challenge to the adjustments to DHLP's partnership items under IRC § 6226. The Tax Court does not have jurisdiction to consider summons enforcement proceedings, IRC § 7604(a); *Ash v. Comm'r*, 96 T.C. 459, 462, 1991 WL 30196 (1991), and the district court, in a summons enforcement proceeding, does not have jurisdiction to consider the FPAA adjustments to DHLP's tax reporting. *Morse*, 532 F.3d at 1132 (holding a court in a summons enforcement proceeding does not have authority over the validity of a tax assessment).

Respondent also maintains that DHLP's statute of limitations period for the years covered by the FPAA has expired, and that this would prevent the Summons from being enforceable. The Response offers no authority for its position. The factual premise regarding DHLP's statute of limitations period is incorrect. The statute of limitations period for the DHLP tax years covered by the FPAA remains open. As noted in the Second Affirmative Defense, the IRS issued the FPAA prior to the close of the statute of limitations period. The period for making an assessment is extended under IRC § 6229(d) for one year after the conclusion of the Tax Court proceeding, which is ongoing.

Respondent also argues that the Summons should not be enforced because "the Government" told an attorney for DHLP that the government would not enforce the Summons if a petition was filed with the

Tax Court. This allegation is nothing more than a bald assertion unsupported by any credible evidence. Unsupported allegations are insufficient to rebut the government's prima facie case.

Arguing that he has raised "in a substantial way the existence of substantial deficiencies in the summons proceedings," Respondent demands discovery and a hearing. In support of this request, he cites *United States v. Southeast First National Bank of Miami Springs*, 655 F.2d 661 (5th Cir. 1981). This case was relied upon in *Nero Trading LLC v. United States*, 570 F.3d 1244, 1249 (11th Cir. 2009), which allowed a limited adversarial hearing to provide the taxpayer with a meaningful opportunity "to challenge the summons on any appropriate grounds," but may be limited as long as the court does not deny the taxpayer "his sole means of demonstrating the truth (or falsity) of his allegations. *Nero*, 570 F.3d at 1249 & n.3. Providing an adversarial hearing does not require an evidentiary hearing. *See Tiffany Fine Arts*, 469 U.S. at 324, n.7 (holding that district court did not abuse its discretion in determining "that an evidentiary hearing on the question of enforcement was unnecessary"). Significantly, the Eleventh Circuit faulted the district court in Nero for inadequately explaining its decision not to hold an evidentiary hearing, not for failing to hold one. *Nero*, 570 F.3d at 1250. *Nero* should not be read to require an evidentiary hearing upon a mere allegation of improper purpose. In *Tiffany Fine Arts*, the Supreme Court upheld the denial of an evidentiary hearing in a summons enforcement proceeding under similar circumstances and emphasized that "the burden of

showing an abuse of the court's process is on the taxpayer . 469 U.S. at 324 n.7 ("We also find that it was well within the District Court's discretion to conclude, after reviewing the submissions of the parties and holding oral argument, that an evidentiary hearing on the question of enforcement was unnecessary.). Here, the respondent has made no meaningful allegations of improper purpose which warrant the Court allowing discovery into and a hearing on the allegations raised in the Response. The Court will deny Respondent access to discovery and will not hold an evidentiary hearing.

Respondent also moves for summary dismissal or for scheduling of a pretrial conference. Respondent's motion in this regard largely reiterates the arguments set forth in response to the summons. Respondent makes two new arguments, however. First, he suggests that the issuance of the summons may have violated the intent of the Internal Revenue Manual (IRM). Second, he suggests that this Court should adopt a rule that enforcement of a summons issued pursuant to 26 U.S.C. § 7602 before Tax Court litigation is commenced should be limited in the same manner as discovery under Bankruptcy Rule 2004 is limited once litigation between the parties has commenced.

Respondent does not actually allege that the IRM guidelines on issuing summonses were violated, since he acknowledges that the summons was issued *before* the FPAA was issued or the Tax Court proceedings begun, as the IRM permits. Nevertheless, Respond-

ent deems suspicious the timing of the enforcement proceedings relative to the issuance of the FPAA and the initiation of the Tax Court case. Respondent offers no evidence to support his suspicions that this enforcement proceeding violates the IRM's proscription on issuance of a post-FPAA summons. Even if he could offer evidence to that effect, the IRM itself confers no rights on Clarke here. *Matthews v. Commissioner*, T.C. Memo. 2008-126, 2008 WL 1946817, at *11 (U.S. Tax Ct. 2008) ("Initially, we note the well-settled principle that the Internal Revenue Manual does not have the force of law, is not binding on the IRS, and confers no rights on taxpayers.).

Respondent also asks the Court to create a new rule that bars summons enforcement once a Tax Court case or other litigation is commenced that concerns the subject of the summons. As noted, the government's power to enforce a summons does not terminate merely because a statutory notice of deficiency or final partnership administrative adjustment has been issued and a Tax Court proceeding has begun. It is hereby

ORDERED AND ADJUDGED that the petition to enforce Internal Revenue Summons, filed April 28, 2011 [DE 1], is GRANTED. It is further

ORDERED AND ADJUDGED that the motion for summary dismissal and for a pretrial conference, filed October 19, 2011 [DE 20], is DENIED. The Clerk of Court shall CLOSE this case and DENY any pending motions as MOOT.

DONE AND ORDERED at Chambers in West Palm Beach, Florida, this 16th day of April, 2012.

/s/ KENNETH L. RYSKAMP
KENNETH L. RYSKAMP
UNITED STATES DISTRICT
JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

11-80459-MC-RYSKAMP/VITUNAC

UNITED STATES OF AMERICA, PETITIONER

v.

RITA HOLLOWAY, AS TRUSTEE FOR THE 2005 CHRISTINE MOOG FAMILY DELAWARE DYNASTY TRUST, RESPONDENT

Filed: Apr. 16, 2012

ORDER GRANTING PETITION TO ENFORCE INTERNAL REVENUE SUMMONS AND DENYING MOTION FOR SUMMARY DISMISSAL

THIS CAUSE comes before the Court pursuant to the petition to enforce Internal Revenue Summons, filed April 28, 2011 [DE 1]. The Court issued an order requiring a response to the summons on May 3, 2011 [DE 3]. Respondent answered the summons on August 18, 2011 [DE 10], and the government replied on August 31, 2011 [DE 12]. The Court granted Dynamo Holdings Limited Partnership's ("DHLP") motion to intervene on August 30, 2011 [DE 11], and DHLP filed its answer, which adopted Respondent's response, on September 6, 2011 [DE 13]. On October 19, 2011 [DE

16], Respondent and DHLP moved for summary dismissal or for scheduling of a pretrial conference. The government responded on November 7, 2011 [DE 17], and Respondent and DHLP replied on November 17, 2011 [DE 18]. This matter is ripe for adjudication.

According to the petition, Internal Revenue Agent Mary Fierfelder and the Internal Revenue Service have examined the tax returns of DHLP for the years ending December 31, 2005, December 31, 2006, and December 31, 2007. During the exam, issues arose with respect to debt that DHLP reported on its returns, including DHLP's questionable interest expenses in the amount of $17,000,000 in both 2006 and 2007. The summons seeks testimony and records that Ms. Holloway may have regarding the tax reporting obligations of DHLP and deductions it has claimed.

As part of her investigation, on September 27, 2010, Agent Fierfelder issued an administrative summons (Form 2039) directing Ms. Holloway to appear before her on October 25, 2010, to give testimony and to produce for examination certain books, records, papers or other data, as described in the summons. Agent Fierfelder served the summons on Ms. Holloway in accordance with 26 U.S.C. § 7603 by handing a copy of the summons to him on September 30, 2010. On October 1, 2010, Agent Fierfelder served notice required by 26 U.S.C. § 7609(a) on the persons entitled to notice according to Exhibit B of the summons, by sending it by certified mail, as evidenced in the certificate of service on the reverse side of the summons. On October 25, 2010, Ms. Holloway did not appear, and to

date, Ms. Holloway has not produced any material or provided any testimony as sought in the summons.

As a result of the examination, the IRS issued a "Notice of Final Partnership Administrative Adjustment," ("FPAA") on December 28, 2010. On February 1, 2011, DHLP filed in the United States Tax Court a "Petition for Readjustment of Partnership Items Under Code Section 6226," assigned Docket number 2685-11, (the "Tax Court Petition"), challenging the determinations made by the Government in the FPAA. Thereafter, this proceeding was commenced to enforce the Summons in issue.

The government asserts that the information sought is in the possession, custody, or control of Ms. Holloway and is not already in the possession of the Internal Revenue Service. The government asserts that the information sought may be relevant to the determination of the correctness of the federal tax reporting by DHLP for the tax years ending December 31, 2005, December 31, 2006, and December 31, 2007. The government also asserts that there is no Department of Justice referral, as defined in 26 U.S.C. § 7602(d)(2), in effect with respect to DHLP for the tax years covered by the summons. Further, the government asserts that all administrative steps for the issuance of the summonses have been followed and the summons has not been issued for any improper purpose.

To obtain enforcement of a summons, the government must establish that the summons is issued for a legitimate purpose, seeks information relevant to that

purpose, seeks information that is not already in the IRS's possession, and that the summons satisfies all administrative steps required by the Internal Revenue Code. *United States v. Powell*, 379 U.S. 48, 57-58 (1964).

Accordingly, on May 3, 2011, the Court required Ms. Holloway to file a written response stating why she should not comply with the summons.

The response fails to rebut the government's prima facie case. The Response discusses the Tax Court proceedings referenced above. But the fact that DHLP is challenging the FPAA in Tax Court is irrelevant since the subsequent initiation of a Tax Court proceeding has no effect on the summons enforcement process.

The Response contends that the government has possession of certain unspecified documents and information requested by the summons. That Response also alleges that the government has all the information it needs analyze the tax reporting obligations of DHLP. Yet Respondent does not deny that he has not provided all the documents and provided the testimony requested by the summons, and she has offered no facts or evidence to contradict Revenue Agent Fierfelder's Declaration that the government does not possess the documents sought.

The Response contends that the government may not establish a prima facie case through a declaration by a revenue agent. That position is baseless. *See United States v. Morse*, 532 F.3d 1130, 1132 (11th Cir. 2008) (stating that a sworn affidavit of the agent who

issued the summons is sufficient to demonstrate a prima facie case). The response also asserts that the Declaration of the Revenue Agent is unsworn, but the Declaration states it was made pursuant to 28 U.S.C. § 1746, which treats such declaration as having the same force and effect as a sworn declaration. Moreover, the Declaration was made pursuant to penalties of perjury.

The Respondent's affirmative defenses also fail. The Response first alleges that the government is engaged in an improper second examination of another taxpayer, Beekman Vista, Inc., and that information obtained through the summons might be used in the Beekman examination. The government has established a prima facie case that it has a legitimate need for the information sought by the summons to investigate DHLP. That there might be an additional use of the information does not render an otherwise enforceable summons unenforceable. *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 324 (1985).

The second ground offered for not enforcing the summons is that the government is displeased that DHLP declined to extend its statute of limitations period. This is mere conjecture unsupported by evidence. Establishing an improper purpose requires more than a naked assertion. *United States v. Millman*, 765 F.2d 27, 29 (2d Cir. 1985) (holding that a taxpayer must make "a substantial preliminary showing" that the IRS has abused its summons power) (quoting *Tiffany Fine Arts, Inc.*, 718 F.2d 7, 14 (2d Cir. 1983), *aff'd* 469 U.S. 310 (1985)). Even if the IRS

were displeased, such has no bearing on whether the issuance of a summons for information that is clearly relevant to the issues being examined was improper.

The Response's third grounds against enforcement of the summons is that the government's power to enforce a summons terminates when a taxpayer petitions the Tax Court because this might allow the government to obtain more information than it could by the Tax Court's discovery tools alone. The Response is incorrect as a matter of law. The government's power to enforce a summons does not terminate merely because a statutory notice of deficiency or FPAA has been issued and a Tax Court proceeding has begun. *PAA Mgmt., Ltd. v. United States*, 962 F.2d 212, 219 (2nd Cir. 1992). The validity of a summons is tested as of the date of issuance. Events occurring after the date of issuance, but before enforcement, should not affect enforceability. *See United States v. Centennial Builders, Inc.*, 747 F.2d 678, 681, n.1 (11th Cir. 1984).

The Response's fourth ground for non-enforcement of the summons is comity. The respondent posits that comity requires the Tax Court, which currently has DHLP's partnership proceeding, take over the instant summons enforcement proceeding because the two proceedings are the same. Contrary to the Response's assertion, the District Court and the Tax Court are not presented with the same lawsuit. The instant case involves the enforcement of a summons under section 7604 of the Internal Revenue Code ("IRC"). The Tax Court proceeding involves a chal-

lenge to the adjustments to DHLP's partnership items under IRC § 6226. The Tax Court does not have jurisdiction to consider summons enforcement proceedings, IRC § 7604(a); *Ash v. Comm'r*, 96 T.C. 459, 462 (1991), and the district court, in a summons enforcement proceeding, does not have jurisdiction to consider the FPAA adjustments to DHLP's tax reporting. *Morse*, 532 F.3d at 1132 (holding a court in a summons enforcement proceeding does not have authority over the validity of a tax assessment).

Respondent also maintains that DHLP's statute of limitations period for the years covered by the FPAA has expired, and that this would prevent the Summons from being enforceable. The Response offers no authority for its position. The factual premise regarding DHLP's statute of limitations period is incorrect. The statute of limitations period for the DHLP tax years covered by the FPAA remains open. As noted in the Second Affirmative Defense, the IRS issued the FPAA prior to the close of the statute of limitations period. The period for making an assessment is extended under IRC § 6229(d) for one year after the conclusion of the Tax Court proceeding, which is ongoing.

Respondent also argues that the Summons should not be enforced because "the Government" told an attorney for DHLP that the government would not enforce the Summons if a petition was filed with the Tax Court. This allegation is nothing more than a bald assertion unsupported by any credible evidence.

Unsupported allegations are insufficient to rebut the government's prima facie case.

Arguing that she has raised "in a substantial way the existence of substantial deficiencies in the summons proceedings," Respondent demands discovery and a hearing. In support of this request, she cites *United States v. Southeast First National Bank of Miami Springs*, 655 F.2d 661 (5th Cir. 1981). This case was relied upon in *Nero Trading LLC v. United States*, 570 F.3d 1244, 1249 (11th Cir. 2009), which allowed a limited adversarial hearing to provide the taxpayer with a meaningful opportunity "to challenge the summons on any appropriate grounds," but may be limited as long as the court does not deny the taxpayer "his sole means of demonstrating the truth (or falsity) of his allegations." *Nero*, 570 F.3d at 1249 & n.3. Providing an adversarial hearing does not require an evidentiary hearing. *See Tiffany Fine Arts*, 469 U.S. at 324, n.7 (holding that district court did not abuse its discretion in determining "that an evidentiary hearing on the question of enforcement was unnecessary"). Significantly, the Eleventh Circuit faulted the district court in Nero for inadequately explaining its decision not to hold an evidentiary hearing, not for failing to hold one. *Nero*, 570 F.3d at 1250. *Nero* should not be read to require an evidentiary hearing upon a mere allegation of improper purpose. In *Tiffany Fine Arts*, the Supreme Court upheld the denial of an evidentiary hearing in a summons enforcement proceeding under similar circumstances and emphasized that "the burden of showing an abuse of the court's process is on the taxpayer." 469 U.S. at 324 n.7 ("We also find

that it was well within the District Court's discretion to conclude, after reviewing the submissions of the parties and holding oral argument, that an evidentiary hearing on the question of enforcement was unnecessary."). Here, the respondent has made no meaningful allegations of improper purpose which warrant the Court allowing discovery into and a hearing on the allegations raised in the Response. The Court will deny Respondent access to discovery and will not hold an evidentiary hearing.

Respondent also moves for summary dismissal or for scheduling of a pretrial conference. Respondent's motion in this regard largely reiterates the arguments set forth in response to the summons. Respondent makes two new arguments, however. First, she suggests that the issuance of the summons may have violated the intent of the Internal Revenue Manual (IRM). Second, she suggests that this Court should adopt a rule that enforcement of a summons issued pursuant to 26 U.S.C. § 7602 before Tax Court litigation is commenced should be limited in the same manner as discovery under Bankruptcy Rule 2004 is limited once litigation between the parties has commenced.

Respondent does not actually allege that the IRM guidelines on issuing summonses were violated, since she acknowledges that the summons was issued *before* the FPAA was issued or the Tax Court proceedings begun, as the IRM permits. Nevertheless, Respondent deems suspicious the timing of the enforcement proceedings relative to the issuance of the FPAA and

the initiation of the Tax Court case. Respondent offers no evidence to support her suspicions that this enforcement proceeding violates the IRM's proscription on issuance of a post-FPAA summons. Even if she could offer evidence to that effect, the IRM itself confers no rights on Holloway here. *Matthews v. Commissioner*, T.C. Memo. 2008-126, 2008 WL 1946817, at *11 (U.S. Tax Ct. 2008) ("Initially, we note the well-settled principle that the Internal Revenue Manual does not have the force of law, is not binding on the IRS, and confers no rights on taxpayers.").

Respondent also asks the Court to create a new rule that bars summons enforcement once a Tax Court case or other litigation is commenced that concerns the subject of the summons. As noted, the government's power to enforce a summons does not terminate merely because a statutory notice of deficiency or final partnership administrative adjustment has been issued and a Tax Court proceeding has begun. It is hereby

ORDERED AND ADJUDGED that the petition to enforce Internal Revenue Summons, filed April 28, 2011 [**DE 1**], is GRANTED. It is further

ORDERED AND ADJUDGED that the motion for summary dismissal and for a pretrial conference, filed October 19, 2011 [**DE 16**], is DENIED. The Clerk of Court shall CLOSE this case and DENY any pending motions as MOOT.

DONE AND ORDERED at Chambers in West Palm Beach, Florida, this 16th day of April, 2012.

/s/ KENNETH L. RYSKAMP
KENNETH L. RYSKAMP
UNITED STATES DISTRICT
JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

11-80460-MC-RYSKAMP/VITUNAC

UNITED STATES OF AMERICA, PETITIONER

v.

MARC JULIEN, AS TRUSTEE FOR THE 2005 ROBERT JULIEN DELAWARE DYNASTY TRUST,
RESPONDENT

Filed: Apr. 16, 2012

ORDER GRANTING PETITION TO ENFORCE INTERNAL REVENUE SUMMONS AND DENYING MOTION FOR SUMMARY DISMISSAL

THIS CAUSE comes before the Court pursuant to the petition to enforce Internal Revenue Summons, filed April 28, 2011 [**DE 1**]. The Court issued an order requiring a response to the summons on June 14, 2011 [**DE 6**]. Respondent answered the summons on August 18, 2011 [**DE 12**], and the government replied on August 31, 2011 [**DE 14**]. The Court granted Dynamo Holdings Limited Partnership's ("DHLP") motion to intervene on August 30, 2011 [**DE 13**], and DHLP filed its answer, which adopted Respondent's response, on September 6, 2011 [**DE 15**]. On October 19, 2011 [**DE**

18], Respondent and DHLP moved for summary dismissal or for scheduling of a pretrial conference. The government responded on November 7, 2011 [DE 19], and Respondent and DHLP replied on November 17, 2011 [DE 20]. This matter is ripe for adjudication.

According to the petition, Internal Revenue Agent Mary Fierfelder and the Internal Revenue Service have examined the tax returns of DHLP for the years ending December 31, 2005, December 31, 2006, and December 31, 2007. During the exam, issues arose with respect to debt that DHLP reported on its returns, including DHLP's questionable interest expenses in the amount of $17,000,000 in both 2006 and 2007. The summons seeks testimony and records that Mr. Julien may have regarding the tax reporting obligations of DHLP and deductions it has claimed.

As part of her investigation, on September 27, 2010, Agent Fierfelder issued an administrative summons (Form 2039) directing Mr. Julien to appear before her on October 25, 2010, to give testimony and to produce for examination certain books, records, papers or other data, as described in the summons. Agent Fierfelder served the summons on Mr. Julien in accordance with 26 U.S.C. § 7603 by handing a copy of the summons to him on September 28, 2010. On September 28, 2010, Agent Fierfelder served notice required by 26 U.S.C. § 7609(a) on the persons entitled to notice according to Exhibit B of the summons, by sending it by certified mail, as evidenced in the certificate of service on the reverse side of the summons. On October 25, 2010, Mr. Julien did not appear, and to date, Mr. Julien has

not produced any material or provided any testimony as sought in the summons.

As a result of the examination, the IRS issued a "Notice of Final Partnership Administrative Adjustment," ("FPAA") on December 28, 2010. On February 1, 2011, DHLP filed in the United States Tax Court a "Petition for Readjustment of Partnership Items Under Code Section 6226," assigned Docket number 2685-11, (the "Tax Court Petition"), challenging the determinations made by the Government in the FPAA. Thereafter, this proceeding was commenced to enforce the Summons in issue.

The government asserts that the information sought is in the possession, custody, or control of Mr. Julien and is not already in the possession of the Internal Revenue Service. The government asserts that the information sought may be relevant to the determination of the correctness of the federal tax reporting by DHLP for the tax years ending December 31, 2005, December 31, 2006, and December 31, 2007. The government also asserts that there is no Department of Justice referral, as defined in 26 U.S.C. § 7602(d)(2), in effect with respect to DHLP for the tax years covered by the summons. Further, the government asserts that all administrative steps for the issuance of the summonses have been followed and the summons has not been issued for any improper purpose.

To obtain enforcement of a summons, the government must establish that the summons is issued for a legitimate purpose, seeks information relevant to that

purpose, seeks information that is not already in the IRS's possession, and that the summons satisfies all administrative steps required by the Internal Revenue Code. *United States v. Powell*, 379 U.S. 48, 57-58 (1964).

Accordingly, on June 14, 2011, the Court required Mr. Julien to file a written response stating why he should not comply with the summons.

The Response fails to rebut the government's prima facie case. The Response discusses the Tax Court proceedings referenced above. But the fact that DHLP is challenging the FPAA in Tax Court is irrelevant since the subsequent initiation of a Tax Court proceeding has no effect on the summons enforcement process.

The Response contends that the government has possession of certain unspecified documents and information requested by the summons. That Response also alleges that the government has all the information it needs analyze the tax reporting obligations of DHLP. Yet Respondent does not deny that he has not provided all the documents and provided the testimony requested by the summons, and she has offered no facts or evidence to contradict Revenue Agent Fierfelder's Declaration that the government does not possess the documents sought.

The Response contends that the government may not establish a prima facie case through a declaration by a revenue agent. That position is baseless. *See United States v. Morse*, 532 F.3d 1130, 1132 (11th Cir. 2008) (stating that a sworn affidavit of the agent who

issued the summons is sufficient to demonstrate a prima facie case). The response also asserts that the Declaration of the Revenue Agent is unsworn, but the Declaration states it was made pursuant to 28 U.S.C. § 1746, which treats such declaration as having the same force and effect as a sworn declaration. Moreover, the Declaration was made pursuant to penalties of perjury.

The Respondent's affirmative defenses also fail. The Response first alleges that the government is engaged in an improper second examination of another taxpayer, Beekman Vista, Inc., and that information obtained through the summons might be used in the Beekman examination. The government has established a prima facie case that it has a legitimate need for the information sought by the summons to investigate DHLP. That there might be an additional use of the information does not render an otherwise enforceable summons unenforceable. *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 324 (1985).

The second ground offered for not enforcing the summons is that the government is displeased that DHLP declined to extend its statute of limitations period. This is mere conjecture unsupported by evidence. Establishing an improper purpose requires more than a naked assertion. *United States v. Millman*, 765 F.2d 27, 29 (2d Cir. 1985) (holding that a taxpayer must make "a substantial preliminary showing" that the IRS has abused its summons power) (quoting *Tiffany Fine Arts, Inc.*, 718 F.2d 7, 14 (2d Cir. 1983), *aff'd* 469 U.S. 310 (1985)). Even if the IRS were

displeased, such has no bearing on whether the issuance of a summons for information that is clearly relevant to the issues being examined was improper.

The Response's third grounds against enforcement of the summons is that the government's power to enforce a summons terminates when a taxpayer petitions the Tax Court because this might allow the government to obtain more information than it could by the Tax Court's discovery tools alone. The Response is incorrect as a matter of law. The government's power to enforce a summons does not terminate merely because a statutory notice of deficiency or FPAA has been issued and a Tax Court proceeding has begun. *PAA Mgmt., Ltd. v. United States*, 962 F.2d 212, 219 (2nd Cir. 1992). The validity of a summons is tested as of the date of issuance. Events occurring after the date of issuance, but before enforcement, should not affect enforceability. *See United States v. Centennial Builders, Inc.*, 747 F.2d 678, 681, n.1 (11th Cir. 1984).

The Response's fourth ground for non-enforcement of the summons is comity. The respondent posits that comity requires the Tax Court, which currently has DHLP's partnership proceeding, take over the instant summons enforcement proceeding because the two proceedings are the same. Contrary to the Response's assertion, the District Court and the Tax Court are not presented with the same lawsuit. The instant case involves the enforcement of a summons under section 7604 of the Internal Revenue Code ("IRC"). The Tax Court proceeding involves a chal-

lenge to the adjustments to DHLP's partnership items under IRC § 6226. The Tax Court does not have jurisdiction to consider summons enforcement proceedings, IRC § 7604(a); *Ash v. Comm'r*, 96 T.C. 459, 462 (1991), and the district court, in a summons enforcement proceeding, does not have jurisdiction to consider the FPAA adjustments to DHLP's tax reporting. *Morse*, 532 F.3d at 1132 (holding a court in a summons enforcement proceeding does not have authority over the validity of a tax assessment).

Respondent also maintains that DHLP's statute of limitations period for the years covered by the FPAA has expired, and that this would prevent the Summons from being enforceable.

The Response offers no authority for its position. The factual premise regarding DHLP's statute of limitations period is incorrect. The statute of limitations period for the DHLP tax years covered by the FPAA remains open. As noted in the Second Affirmative Defense, the IRS issued the FPAA prior to the close of the statute of limitations period. The period for making an assessment is extended under IRC § 6229(d) for one year after the conclusion of the Tax Court proceeding, which is ongoing.

Respondent also argues that the Summons should not be enforced because "the Government" told an attorney for DHLP that the government would not enforce the Summons if a petition was filed with the Tax Court. This allegation is nothing more than a bald assertion unsupported by any credible evidence.

Unsupported allegations are insufficient to rebut the government's prima facie case.

Arguing that he has raised "in a substantial way the existence of substantial deficiencies in the summons proceedings," Respondent demands discovery and a hearing. In support of this request, he cites *United States v. Southeast First National Bank of Miami Springs*, 655 F.2d 661 (5th Cir. 1981). This case was relied upon in *Nero Trading LLC v. United States*, 570 F.3d 1244, 1249 (11th Cir. 2009), which allowed a limited adversarial hearing to provide the taxpayer with a meaningful opportunity "to challenge the summons on any appropriate grounds," but may be limited as long as the court does not deny the taxpayer "his sole means of demonstrating the truth (or falsity) of his allegations." *Nero*, 570 F.3d at 1249 & n.3. Providing an adversarial hearing does not require an evidentiary hearing. *See Tiffany Fine Arts*, 469 U.S. at 324, n.7 (holding that district court did not abuse its discretion in determining "that an evidentiary hearing on the question of enforcement was unnecessary"). Significantly, the Eleventh Circuit faulted the district court in Nero for inadequately explaining its decision not to hold an evidentiary hearing, not for failing to hold one. *Nero*, 570 F.3d at 1250. *Nero* should not be read to require an evidentiary hearing upon a mere allegation of improper purpose. In *Tiffany Fine Arts*, the Supreme Court upheld the denial of an evidentiary hearing in a summons enforcement proceeding under similar circumstances and emphasized that "the burden of showing an abuse of the court's process is on the taxpayer." 469 U.S. at 324 n.7 ("We also find that it was

well within the District Court's discretion to conclude, after reviewing the submissions of the parties and holding oral argument, that an evidentiary hearing on the question of enforcement was unnecessary."). Here, the respondent has made no meaningful allegations of improper purpose which warrant the Court allowing discovery into and a hearing on the allegations raised in the Response. The Court will deny Respondent access to discovery and will not hold an evidentiary hearing.

Respondent also moves for summary dismissal or for scheduling of a pretrial conference. Respondent's motion in this regard largely reiterates the arguments set forth in response to the summons. Respondent makes two new arguments, however. First, he suggests that the issuance of the summons may have violated the intent of the Internal Revenue Manual (IRM). Second, he suggests that this Court should adopt a rule that enforcement of a summons issued pursuant to 26 U.S.C. § 7602 before Tax Court litigation is commenced should be limited in the same manner as discovery under Bankruptcy Rule 2004 is limited once litigation between the parties has commenced.

Respondent does not actually allege that the IRM guidelines on issuing summonses were violated, since he acknowledges that the summons was issued *before* the FPAA was issued or the Tax Court proceedings begun, as the IRM permits. Nevertheless, Respondent deems suspicious the timing of the enforcement proceedings relative to the issuance of the FPAA and

the initiation of the Tax Court case. Respondent offers no evidence to support his suspicions that this enforcement proceeding violates the IRM's proscription on issuance of a post-FPAA summons. Even if he could offer evidence to that effect, the IRM itself confers no rights on Julien here. *Matthews v. Commissioner*, T.C. Memo. 2008-126, 2008 WL 1946817, at *11 (U.S. Tax Ct. 2008) ("Initially, we note the well-settled principle that the Internal Revenue Manual does not have the force of law, is not binding on the IRS, and confers no rights on taxpayers.").

Respondent also asks the Court to create a new rule that bars summons enforcement once a Tax Court case or other litigation is commenced that concerns the subject of the summons. As noted, the government's power to enforce a summons does not terminate merely because a statutory notice of deficiency or final partnership administrative adjustment has been issued and a Tax Court proceeding has begun. It is hereby

ORDERED AND ADJUDGED that the petition to enforce Internal Revenue Summons, filed April 28, 2011 [DE 1], is GRANTED. It is further

ORDERED AND ADJUDGED that the motion for summary dismissal and for a pretrial conference, filed October 19, 2011 [DE 18], is DENIED. The Clerk of Court shall CLOSE this case and DENY any pending motions as MOOT.

DONE AND ORDERED at Chambers in West Palm Beach, Florida, this 16th day of April, 2012.

/s/ KENNETH L. RYSKAMP
KENNETH L. RYSKAMP
UNITED STATES DISTRICT
JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

11-80461-MC-RYSKAMP/VITUNAC

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT JULIEN, RESPONDENT

Filed: Apr. 17, 2012

ORDER GRANTING PETITION TO ENFORCE INTERNAL REVENUE SUMMONS AND DENYING MOTION FOR SUMMARY DISMISSAL

THIS CAUSE comes before the Court pursuant to the petition to enforce Internal Revenue Summons, filed April 28, 2011 [DE 1]. The Court issued an order requiring a response to the summons on June 14, 2011 [DE 3]. Respondent answered the summons on August 18, 2011 [DE 7], and the government replied on August 31, 2011 [DE 9]. The Court granted Dynamo Holdings Limited Partnership's ("DHLP") motion to intervene on August 30, 2011 [DE 15], and DHLP filed its answer, which adopted Respondent's response, on September 6, 2011 [DE 16]. On October 19, 2011 [DE 19], Respondent and DHLP moved for summary dis-

missal or for scheduling of a pretrial conference. The government responded on November 7, 2011 [DE 21], and Respondent and DHLP replied on November 17, 2011 [DE 22]. This matter is ripe for adjudication.

According to the petition, Internal Revenue Agent Mary Fierfelder and the Internal Revenue Service have examined the tax returns of DHLP for the years ending December 31, 2005, December 31, 2006, and December 31, 2007. During the exam, issues arose with respect to debt that DHLP reported on its returns, including DHLP's questionable interest expenses in the amount of $17,000,000 in both 2006 and 2007. The summons seeks testimony and records that Mr. Julien may have regarding the tax reporting obligations of DHLP and deductions it has claimed.

As part of her investigation, on October 25, 2010, Agent Fierfelder issued an administrative summons (Form 2039) directing Mr. Julien to appear before her on December 3, 2010, to give testimony and to produce for examination certain books, records, papers or other data, as described in the summons. Agent Fierfelder served the summons on Mr. Julien in accordance with 26 U.S.C. § 7603 by handing a copy of the summons to him on October 28, 2010. On October 28, 2010, Agent Fierfelder served notice required by 26 U.S.C. § 7609(a) on the persons entitled to notice according to Exhibit B of the summons, by sending it by certified mail, as evidenced in the certificate of service on the reverse side of the summons. On December 3, 2010, Mr. Julien did not appear, and to date, Mr. Julien has

not produced any material or provided any testimony as sought in the summons.

As a result of the examination, the IRS issued a "Notice of Final Partnership Administrative Adjustment," ("FPAA") on December 28, 2010. On February 1, 2011, DHLP filed in the United States Tax Court a "Petition for Readjustment of Partnership Items Under Code Section 6226," assigned Docket number 2685-11, (the "Tax Court Petition"), challenging the determinations made by the Government in the FPAA. Thereafter, this proceeding was commenced to enforce the Summons in issue.

The government asserts that the information sought is in the possession, custody, or control of Mr. Julien and is not already in the possession of the Internal Revenue Service. The government asserts that the information sought may be relevant to the determination of the correctness of the federal tax reporting by DHLP for the tax years ending December 31, 2005, December 31, 2006, and December 31, 2007. The government also asserts that there is no Department of Justice referral, as defined in 26 U.S.C. § 7602(d)(2), in effect with respect to DHLP for the tax years covered by the summons. Further, the government asserts that all administrative steps for the issuance of the summonses have been followed and the summons has not been issued for any improper purpose.

To obtain enforcement of a summons, the government must establish that the summons is issued for a legitimate purpose, seeks information relevant to that

purpose, seeks information that is not already in the IRS's possession, and that the summons satisfies all administrative steps required by the Internal Revenue Code. *United States v. Powell*, 379 U.S. 48, 57-58 (1964).

Accordingly, on May 3, 2011, the Court required Mr. Julien to file a written response stating why he should not comply with the summons.

The Response fails to rebut the government's prima facie case. The Response discusses the Tax Court proceedings referenced above. But the fact that DHLP is challenging the FPAA in Tax Court is irrelevant since the subsequent initiation of a Tax Court proceeding has no effect on the summons enforcement process.

The Response contends that the government has possession of certain unspecified documents and information requested by the summons. That Response also alleges that the government has all the information it needs analyze the tax reporting obligations of DHLP Yet Respondent does not deny that he has not provided all the documents and provided the testimony requested by the summons, and she has offered no facts or evidence to contradict Revenue Agent Fierfelder's Declaration that the government does not possess the documents sought.

The Response contends that the government may not establish a prima facie case through a declaration by a revenue agent. That position is baseless. *See United States v. Morse*, 532 F.3d 1130, 1132 (11th Cir. 2008) (stating that a sworn affidavit of the agent who

issued the summons is sufficient to demonstrate a prima facie case). The response also asserts that the Declaration of the Revenue Agent is unsworn, but the Declaration states it was made pursuant to 28 U.S.C. § 1746, which treats such declaration as having the same force and effect as a sworn declaration. Moreover, the Declaration was made pursuant to penalties of perjury.

The Respondent's affirmative defenses also fail. The Response first alleges that the government is engaged in an improper second examination of another taxpayer, Beekman Vista, Inc., and that information obtained through the summons might be used in the Beekman examination. The government has established a prima facie case that it has a legitimate need for the information sought by the summons to investigate DHLP. That there might be an additional use of the information does not render an otherwise enforceable summons unenforceable. *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 324 (1985).

The second ground offered for not enforcing the summons is that the government is displeased that DHLP declined to extend its statute of limitations period. This is mere conjecture unsupported by evidence. Establishing an improper purpose requires more than a naked assertion. *United States v. Millman*, 765 F.2d 27, 29 (2d Cir. 1985) (holding that a taxpayer must make "a substantial preliminary showing" that the IRS has abused its summons power) (quoting *Tiffany Fine Arts, Inc.*, 718 F.2d 7, 14 (2d Cir. 1983), *aff'd* 469 U.S. 310 (1985)). Even if the IRS were

displeased, such has no bearing on whether the issuance of a summons for information that is clearly relevant to the issues being examined was improper.

The Response's third grounds against enforcement of the summons is that the government's power to enforce a summons terminates when a taxpayer petitions the Tax Court because this might allow the government to obtain more information than it could by the Tax Court's discovery tools alone. The Response is incorrect as a matter of law. The government's power to enforce a summons does not terminate merely because a statutory notice of deficiency or FPAA has been issued and a Tax Court proceeding has begun. *PAA Mgmt., Ltd. v. United States*, 962 F.2d 212, 219 (2nd Cir. 1992). The validity of a summons is tested as of the date of issuance. Events occurring after the date of issuance, but before enforcement, should not affect enforceability. *See United States v. Centennial Builders, Inc.*, 747 F.2d 678, 681, n.1 (11th Cir. 1984).

The Response's fourth ground for non-enforcement of the summons is comity. The respondent posits that comity requires the Tax Court, which currently has DHLP's partnership proceeding, take over the instant summons enforcement proceeding because the two proceedings are the same. Contrary to the Response's assertion, the District Court and the Tax Court are not presented with the same lawsuit. The instant case involves the enforcement of a summons under section 7604 of the Internal Revenue Code ("IRC"). The Tax Court proceeding involves a challenge to the adjustments to DHLP's partnership items

under IRC § 6226. The Tax Court does not have jurisdiction to consider summons enforcement proceedings, IRC § 7604(a); *Ash v. Comm'r*, 96 T.C. 459, 462 (1991), and the district court, in a summons enforcement proceeding, does not have jurisdiction to consider the FPAA adjustments to DHLP's tax reporting. *Morse*, 532 F.3d at 1132 (holding a court in a summons enforcement proceeding does not have authority over the validity of a tax assessment).

Respondent also maintains that DHLP's statute of limitations period for the years covered by the FPAA has expired, and that this would prevent the Summons from being enforceable. The Response offers no authority for its position. The factual premise regarding DHLP's statute of limitations period is incorrect. The statute of limitations period for the DHLP tax years covered by the FPAA remains open. As noted in the Second Affirmative Defense, the IRS issued the FPAA prior to the close of the statute of limitations period. The period for making an assessment is extended under IRC § 6229(d) for one year after the conclusion of the Tax Court proceeding, which is ongoing.

Respondent also argues that the Summons should not be enforced because "the Government" told an attorney for DHLP that the government would not enforce the Summons if a petition was filed with the Tax Court. This allegation is nothing more than a bald assertion unsupported by any credible evidence. Unsupported allegations are insufficient to rebut the government's prima facie case.

Arguing that he has raised "in a substantial way the existence of substantial deficiencies in the summons proceedings," Respondent demands discovery and a hearing. In support of this request, he cites *United States v. Southeast First National Bank of Miami Springs*, 655 F.2d 661 (5th Cir. 1981). This case was relied upon in *Nero Trading LLC v. United States*, 570 F.3d 1244, 1249 (11th Cir. 2009), which allowed a limited adversarial hearing to provide the taxpayer with a meaningful opportunity "to challenge the summons on any appropriate grounds," but may be limited as long as the court does not deny the taxpayer "his sole means of demonstrating the truth (or falsity) of his allegations." *Nero*, 570 F.3d at 1249 & n.3. Providing an adversarial hearing does not require an evidentiary hearing. *See Tiffany Fine Arts*, 469 U.S. at 324, n.7 (holding that district court did not abuse its discretion in determining "that an evidentiary hearing on the question of enforcement was unnecessary"). Significantly, the Eleventh Circuit faulted the district court in Nero for inadequately explaining its decision not to hold an evidentiary hearing, not for failing to hold one. *Nero*, 570 F.3d at 1250. *Nero* should not be read to require an evidentiary hearing upon a mere allegation of improper purpose. In *Tiffany Fine Arts*, the Supreme Court upheld the denial of an evidentiary hearing in a summons enforcement proceeding under similar circumstances and emphasized that "the burden of showing an abuse of the court's process is on the taxpayer." 469 U.S. at 324 n.7 ("We also find that it was well within the District Court's discretion to conclude, after reviewing the submissions of the parties and

holding oral argument, that an evidentiary hearing on the question of enforcement was unnecessary."). Here, the respondent has made no meaningful allegations of improper purpose which warrant the Court allowing discovery into and a hearing on the allegations raised in the Response. The Court will deny Respondent access to discovery and will not hold an evidentiary hearing.

Respondent also moves for summary dismissal or for scheduling of a pretrial conference. Respondent's motion in this regard largely reiterates the arguments set forth in response to the summons. Respondent makes two new arguments, however. First, he suggests that the issuance of the summons may have violated the intent of the Internal Revenue Manual (IRM). Second, he suggests that this Court should adopt a rule that enforcement of a summons issued pursuant to 26 U.S.C. § 7602 before Tax Court litigation is commenced should be limited in the same manner as discovery under Bankruptcy Rule 2004 is limited once litigation between the parties has commenced.

Respondent does not actually allege that the IRM guidelines on issuing summonses were violated, since he acknowledges that the summons was issued *before* the FPAA was issued or the Tax Court proceedings begun, as the IRM permits. Nevertheless, Respondent deems suspicious the timing of the enforcement proceedings relative to the issuance of the FPAA and the initiation of the Tax Court case. Respondent offers no evidence to support his suspicions that this

enforcement proceeding violates the IRM's proscription on issuance of a post-FPAA summons. Even if he could offer evidence to that effect, the IRM itself confers no rights on Julien here. *Matthews v. Commissioner*, T.C. Memo. 2008-126, 2008 WL 1946817, at *11 (U.S. Tax Ct. 2008) ("Initially, we note the well-settled principle that the Internal Revenue Manual does not have the force of law, is not binding on the IRS, and confers no rights on taxpayers.").

Respondent also asks the Court to create a new rule that bars summons enforcement once a Tax Court case or other litigation is commenced that concerns the subject of the summons. As noted, the government's power to enforce a summons does not terminate merely because a statutory notice of deficiency or final partnership administrative adjustment has been issued and a Tax Court proceeding has begun. It is hereby

ORDERED AND ADJUDGED that the petition to enforce Internal Revenue Summons, filed April 28, 2011 [DE 1], is GRANTED. It is further

ORDERED AND ADJUDGED that the motion for summary dismissal and for a pretrial conference, filed October 19, 2011 [DE 19], is DENIED. The Clerk of Court shall CLOSE this case and DENY any pending motions as MOOT.

DONE AND ORDERED at Chambers in West Palm Beach, Florida, this 16th day of April, 2012.

/s/ KENNETH L. RYSKAMP
KENNETH L. RYSKAMP
UNITED STATES DISTRICT
JUDGE

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 11-mc-80456-RYSKAMP/VITUNAC

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL CLARKE AS CHIEF FINANCIAL OFFICER OF BEEKMAN VISTA, INC., ET AL., RESPONDENTS

AND

DYNAMO HOLDINGS LIMITED PARTNERSHIP, INTERVENOR

Filed: Oct. 19, 2011

MOTION FOR SUMMARY DISMISSAL OR SCHEDULING OF PRETRIAL CONFERENCE

Respondents, MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF BEEKMAN VISTA, INC., MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF DYNAMO HOLDINGS, INC., and ROBERT JULIEN, together with Intervenor, DYNAMO HOLDINGS LIMITED PARTNERSHIP (hereinafter "DHLP") (collectively "Movants") by and through their undersigned attorney, move the Court, for alternative relief as follows: (1) pursuant to its

inherent authority to control its own proceedings, to dismiss summarily the petitions to enforce IRS Summonses at issue in these consolidated cases for the government's failure to cooperate in providing evidence necessary to the proper determination of the issues; or, (2) pursuant to Fed. R. Civ. P. Rule 16, to schedule a pretrial conference for the purpose of formulating and simplifying the issues in the case, obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and to control and schedule discovery. In support, Movants say:

SUPPORTING MEMORANDUM
FACTUAL BACKGROUND

This action involves an attempt by the government to enforce five Internal Revenue Service administrative summonses purportedly served in respect of the examination of the tax returns of DHLP for the calendar years ending December 31, 2005, 2006 and 2007. Each summons states on its front page on a line marked "In the matter of" the name "Dynamo Holdings Limited Partnership." Each also states on its front page on a line marked "Periods" the words "Calendar years ended December 31, 2005, December 31, 2006 and December 31, 2007." As alleged in the petitions, none of the persons summoned appeared to be examined on the dates indicated on the summonses. The government did not commence enforcement proceedings in respect of these summonses within three days after the failure of the witnesses to appear. Instead, it proceeded to prepare and issue a Final Partnership Administrative Adjustment (hereinafter

"FPAA") for DHLP. A copy of the FPAA is attached to the responses of each Respondent in this action. *See, e.g.*, DE#7-2 in this case. An FPAA for a limited partnership like DHLP is the functional equivalent of a statutory notice of deficiency ("SND") for an individual or corporate taxpayer. *White and Case v. U.S.*, 22 Ct. Cl. 734, 736 (Ct. Cl. 1991). IRS Agent Mary Fierfelder (hereinafter "Fierfelder"), in her declaration supporting the petitions here says, in the past tense, that the IRS "has examined" the subject returns, DE#1-2, ¶2, not that it is "in the process" of such an examination.

After the FPAA was issued, DHLP commenced an action in the Tax Court seeking readjustment of partnership items adjusted in the FPAA pursuant to Code Section 6226. DE#7-1 in this action. The government, through Special Trial Counsel David Flassing (hereinafter "Flassing"), has answered the petition in the Tax Court. Discovery is available to both parties in those proceedings under the Tax Court Discovery Rules, of which this Court has taken judicial notice. *See* DE#12-1 in this case. Indeed, Flassing has commenced discovery in the Tax Court case. *See, e.g.*, Exhibit "A" attached. Upon information and belief, Flassing, in order to supplement the discovery available to him through the highly restrictive Tax Court Discovery Rules, was himself the impetus for the enforcement of the five summonses at issue here, as well as a sixth summons served upon Christine Moog in New York. This is shown by the fact that the enforcement actions did not begin until six months after most of the summoned witnesses failed to appear,

four months after the FPAA was issued, two months after the Tax Court case was filed and a month after Flassing answered the Tax Court petition.

In an examination pursuant to a Tax Court summons directed to a third party like the Respondents here, the target of the examination, in this case DHLP, has no right to attend and interpose objections of the sort customary in litigation discovery depositions. This procedure is available only to the government. Taxpayers or other targets of IRS investigations have no right to such resources. There are no limits on the scope of the examination other than that the questioning have some arguable connection to the examination of the tax returns mentioned in the summons. In contrast, under the Tax Court Discovery Rules, depositions of any kind are the exception rather than the norm. *See, e.g.*, Tax Court Rule 70(a)(1). However, the discovery methods that are available are equally available to the parties.

While the petitions for enforcement here suggest that enforcement is being sought independently of the Tax Court case by attorneys in the Department of Justice at the behest of a local IRS agent, Mary Fierfelder (hereinafter "Fierfelder") for "proper purposes", the truth is otherwise. Christine Moog, the subject of the sixth summons, appeared and was examined in New York. *See*, Exhibit "B" attached. Fierfelder, the agent who signed the declarations supporting all of the petitions swearing that enforcement of the summonses was needed for the proper purpose of the examination, did not appear. *Id.* Instead, Flassing

appeared with another IRS attorney, Lisa Goldberg. *Id.* Moreover, in the Tax Court case, Flassing: (1) has refused to proceed to appellate conference (the functional equivalent of court- affiliated mediation) on the ground that he first needs the "discovery" sought by the summonses, *see* Exhibit "C" attached; (2) opposed a Tax Court motion for protective order, *inter alia*, on the ground that there had not been complete responses to the instant summonses, Exhibit "D" attached; and, (3) through Goldberg,[1] has most recently sought a continuance of the trial of the Tax Court case because he must first obtain the "discovery" called for by the instant IRS summonses. *See* Exhibit "E" attached.

The IRS publishes a manual, The IRS Manual (hereinafter the "Manual"), that provides guidelines for the conduct of its agents. One portion of the Manual is referred to as the IRS Summons Handbook (hereinafter the "Handbook"). A copy of the portion of the Manual referred to as the Handbook is attached as Exhibit "F." It provides that an IRS summons should not be *issued* in respect of a particular examination after a statutory notice of deficiency has been issued or a Tax Court case commenced because to do so would be abusive. Handbook, ¶25.5.4.4.8 (3). While the Handbook does not have the force of law, it does constitute admissions of the IRS in respect of the normal circumstances of issuance and enforcement of

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[1] This was the same Goldberg who appeared at the examination of Christine Moog.

IRS summonses. *Cunningham v. C.I.R.*, 165 B.R. 599, 607 (N.D. Texas 1993).

In order to support their position that the enforcement proceedings here, like the issuance of a summons after the issuance of a statutory notice of deficiency, is abusive, respondents requested from the government several documents and dates for the depositions of witnesses who would have knowledge of relevant facts. Exhibit "G." The government refused to provide the documents or dates for the depositions. Exhibit "H."

ARGUMENT AND AUTHORITIES

IRS summonses are administrative devices that are typically enforced by United States District Courts unless the witness summoned or the target of the investigation establishes that the summons was not properly issued or that enforcement would constitute an abuse of process. *U.S. v. Powell*, 379 U.S. 48, 57-58 (1964). While such proceedings are often handled via summary procedure, the person subjected to the summons is entitled to a hearing. *Id.*, n.18. Where, as here, the target has presented a colorable claim that the enforcement of the summons would be abusive, both discovery and an evidentiary hearing are in order. *U.S. v. Southeast First National Bank of Miami Springs*, 655 F. 2d 661 (5th Cir. Unit B, 1981).[2] Here the government has failed to cooperate in providing

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[2] Cases decided by the Fifth Circuit Unit B before midnight September 30, 1981, are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard, Alabama*, 661 F. 2d 1206 (11th Cir. 1981). The cited case was decided September 15, 1981.

the Court with the information necessary to resolve the issue before it, or even to acknowledge any responsibility to do so where there is clearly a colorable claim that the conduct of the IRS in seeking enforcement of these summonses is abusive.

As noted above, the Handbook provides guidance for the issuance and enforcement of IRS summonses. It authorizes Internal Revenue Agents, such as Fierfelder, to issue summonses to third party witnesses, such as the Respondents, only when the agent's manager or supervisory official has given prior approval. Handbook, ¶25.5.1.3.3 (1). Even though all of the summonses at issue were directed to third parties as opposed to DHLP itself, the government has refused to provide Movants with a copy of any request for such approval. The Handbook states that when a summoned witness fails to appear, the agent who issued the summons should "Report immediately, through channels to Associate Area Counsel, any refusal to comply." Handbook ¶25.5.10.3 (2). Even though Movants have challenged the regularity of the procedure followed in enforcing the summonses, the government has refused to provide Respondents with a copy of any such report. The Handbook provides that the IRS employee who issued the summons is responsible for the preparation of all requests for civil enforcement using "either the memorandum report format or Form 4443, Summons Referral." Handbook ¶25.5.10.4 (4). Again, despite the issues raised by Movants, the government has refused to provide Respondents with a copy of any such requests. In terms of referral for enforcement, the Handbook calls for the

preparation of a "summons referral" and the sending of that form to the "Technical Services function" (or "TSf") within three business days after the witness fails or refuses to comply, and, if a summons is not referred within that time, the file must be documented to explain why. Handbook, ¶25.5.10.4.1.1 (1)-(3). Despite Movants' challenge of the suspicious timing of the enforcement proceedings relative to the issuance of the FPAA and the initiation of the Tax Court case, the government has refused to provide Movants with a copy of any such documentation.

The failure of the government to follow its own guidelines for the issuance and enforcement of summonses in the ordinary course is itself evidence that these enforcement proceedings are not brought for the purposes for which IRS summonses are authorized, and that, instead, these enforcement proceedings are an abusive attempt to use this Court's processes to evade the strictures of the Tax Court Discovery Rules. The purposes for which IRS summonses are authorized, to the extent applicable here, is examining tax returns preparatory to issuance of a FPAA. Where the summonses are to be used for collection proceedings or criminal enforcement, they are required to disclose those purposes, and these do not. Instead, these summonses identify three tax returns to be examined that, according to Fierfelder, the IRS has already examined and issued a final adjustment. She makes no caveat that the IRS had started the examination or that it was not completed. Indeed, she cannot truthfully say as much since on December 28, 2010, the government issued its FPAA, DE#7-2, p. 1, which

had been signed by her, *id.*, p. 5, on August 11, 2010. From its name, *i.e*, "Final Partnership Administrative Adjustment," and its reference to the three years under examination identified in the summonses, it is apparent that the examination was complete at the time the FPAA was signed and, definitely, no later than December 28, 2010, the date it was issued by the IRS. DE#7-2, p. 1. All of the summonses here were issued *after* Fierfelder signed the FPAA on August 11, 2010.[3] While the FPAA may not formally have been issued until December, it is not logical that Fierfelder, having signed the FPAA already on August 11, 2010, would need to issue the summonses in question in order to complete the "final" report that she had already completed. There must have been some ulterior motive, whether that be retribution for DHLP's refusal to grant a further extension of the applicable statute of limitations, a subterfuge to gather information related to Beekman Vista, Inc., in order to justify reopening the examination of its returns for the same periods or part of a larger scheme on the part of the government to send out such summonses in hopes of being able to use them to subvert the Tax Court Discovery Rules once a Tax Court case was commenced.

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[3] The summonses were issued, respectively, on: September 24, 2010 (Michael Clarke as CFO of Beekman Vista, Inc. and Michael Clarke as CFO of Dynamo GP, Inc.); September 27, 2010 (Rita Holloway as Trustee of the 2005 Christine Moog Family Delaware Dynasty Trust and Marc Julien as Trustee of the 2005 Robert Julien Family Delaware Dynasty Trust); and October 25, 2010 (Robert Julien). The date of issuance of each summons is set forth in paragraph 5 of the petition seeking to enforce it.

It is undisputed that DHLP declined an additional one year extension of the statute of limitations on its tax year ended December 31, 2005 shortly before this flurry of summonses at issue here was issued. The issuance of the summonses shortly after the refusal to extend the statute of limitations gives rise to the inference that the summonses were issued as retribution for the refusal to grant the extension. DHLP has the right to explore this issue through discovery.

A more sinister reason for the government to try to enforce these summonses is its attempt to re-open its examination of Beekman Vista's tax returns for the relevant time period. The examination of those returns was previously completed and resolved by Beekman paying the government over $28 million. Now, however, the government has given signs suggesting that it continues to seek information about Beekman Vista in order to justify a second examination. Seeking information about Beekman Vista via summonses stating on their faces that they relate to the examination of DHLP is dishonest. DHLP has the right to explore this issue through discovery.

The requests for information made in the summonses relate to the issues before the Tax Court in respect of DHLP's petition for readjustment of the adjustments demanded by the government in the FPAA. While the government's petition and supporting papers, following a form set forth in the Handbook, make broad statements concerning the purpose of the summonses, they do not identify any issue to which that information might relate other than the

issues before the Tax Court.[4] All of those issues, if relevant and necessary to that case, should be available under the Tax Court Discovery Rules. This combined with the facts that the summonses were issued after the FPAA was signed, and that they were not enforced until after the Tax Court had been filed and answered, gives rise to the inference that the government, anticipating that there would be litigation in the Tax Court, and that its discovery in the Tax Court would be limited, as a matter of course issued the summonses at issue here even though not needed to complete the FPAA solely for the purpose of evading the Tax Court Discovery Rules. DHLP has the right to explore this issue through discovery.

In order to get at the explanation, if any, for this otherwise inexplicable behavior, a deposition of Fierfelder and her supervisor is necessary. The government has refused to cooperate in the scheduling of those depositions, frustrating Movants' ability to defend these proceedings.

All of the requested documentation is relevant to whether the summonses at issue here were properly issued and whether their enforcement would be abu-

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[4] The information in requested in the summonses might also be relevant to the tax returns of Beekman Vista for the listed tax years, but, as noted above, it would be improper for the IRS to seek that information in these summonses. Unfortunately, in order fully to analyze the relevance of the information requested to anything the government could do legitimately, the Court would need to analyze all of the issues raised by the FPAA and challenged in the petition in the Tax Court.

sive. The documentation is exclusively in the possession of the government, yet it refuses to provide that information for consideration by the Court. For the government's refusal to cooperate, the Court should exercise its inherent authority to control the proceedings before it to dismiss summarily the petitions for enforcement here. Clearly, the government ONLY wants these summonses enforced in order to get discovery for the Tax Court case or for use in the second Beekman Vista examination. While whatever discovery the government needs in the Tax Court case can be obtained there, the government is not content to follow the rules of that court and instead seeks to enlist this Court to relieve it of those rules. Not only is that an abuse of this Court's processes, it is an attempt to draw this Court into a violation of the rules of comity. The rules of comity teach that this Court should defer to the Tax Court which had jurisdiction of the controversy between DHLP and the government well before these enforcement proceedings were commenced. *Merrill Lynch Pierce Fenner & Smith, Inc., v. Haydu*, 675 F. 2d 1169, 1174 (11th Cir. 1982).

There is no case that holds that the government has carte blanche to issue and serve IRS summonses on the eve of issuance of a FPAA knowing that enforcement of the summonses would be of no use in *examining* the tax returns of a target, but, rather, would be useful only in evading the strictures of the discovery rules of the Tax Court. While there are multiple cases that suggest that wide latitude must be given to the government in enforcing such summonses, all contain the caveat that this is not so when issuance of the

summonses was not done in accordance with law, when enforcement would constitute an abuse of the enforcing court's process, or when the government is behaving abusively or in bad faith. Besides the apparent bad faith attempt to obtain information about Beekman Vista under the guise of seeking information about DHLP, in this case the government is abusively attempting to use this Court's process to subvert the discovery rules of the Tax Court to the disadvantage of DHLP. This behavior should be evaluated just as attempts to use Bankruptcy Rule 2004 examinations to evade discovery rules in pending litigation are evaluated, which would mean finding them inherently abusive and impermissible.

There is no good reason that enforcement of a summons issued pursuant to 26 U.S.C. § 7602 before Tax Court litigation is commenced should not be limited just as discovery under Bankruptcy Rule 2004 is limited once litigation between the parties has commenced. Rule 2004 was enacted by Congress to permit those involved in the administration of the bankruptcy laws, such as bankruptcy trustees and other parties in interest, to conduct wide-ranging discovery to ensure the proper liquidation or reorganization of bankruptcy estates. *In re: Bennett Funding Group, Inc.*, 203 B.R. 24, 27-28 (Bkrptcy. NDNY 1996). Discovery under this rule can even be in the nature of a "fishing expedition" so long as it is arguably related to the property of the bankruptcy estate or the financial affairs of the debtor. *Id.*; *In re Szadkowski*, 198 B.R. 140, 141 (Bkrptcy. D. Md. 1996) ("A Rule 2004 examination allows a broad "fishing expedition" into an

entity's affairs for the purpose of obtaining information relevant to the administration of the bankruptcy estate.'). However, once actual litigation commences between the party seeking Rule 2004 discovery and the party from or about whom discovery is sought, further discovery related to the subject matter of the litigation pursuant to Rule 2004 is prohibited. *In re: 2435 Plainfield Avenue, Inc. (2435 Plainfield Avenue, Inc. v. Township of Scotch Plains)*, 223 B.R. 440, 455-56 (Bkrptcy. D.N.J. 1998) (compiling cases) *aff'd* 213 F.3d 629 (3rd Cir. 2000); *Szadkowski, supra*, 142; *Bennett, supra*, 29-30.

The reasoning underlying this "pending adversary rule" is that the court in which the litigation is pending invariably has rules governing the discovery in cases pending before it. Those rules tend to be more restrictive than the rules governing Rule 2004 discovery, limiting parties to discovery relevant to the issues outlined in pleadings, which are themselves subject to limitations. *Snyder v. Society Bank of Ann Arbor, Michigan*, 181 B.R. 40 (S.D. Texas 1994) *aff'd* 52 F3d 1067, 1995 WL 241797[5] (5th Cir. 1995) (no Rule 2004 discovery on subject matter of state court litigation between parties). The decisions limiting the use of Rule 2004 discovery in the face of litigation concerning the same subject matter assume that the discovery

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[5] Although the opinion affirming the trial court decision was not chosen for publication by the Fifth Circuit Court of Appeals, under the rules of that court, unpublished decisions issued before January 1, 1996, are binding precedent. Fifth Circuit Court of Appeals Rule 47.5.3.

rules of the courts handling litigation are entitled to respect and that use of Rule 2004 to get discovery relevant to such litigation is inherently wrong.

Like Rule 2004, §7602 was enacted by Congress to permit those involved in the administration of the tax laws to conduct wide-ranging discovery to ensure the proper reporting of income, assessment of and calculating of taxes. This is obvious from the face of the statute itself which states, *inter alia*: "For the purpose of ascertaining the correctness of any return . . . the Secretary or his delegate is authorized—. . . (2) To summon . . . any person having possession, custody or care of books of account containing entries relating to the business of the person liable for tax . . . to appear before the Secretary or his delegate" to produce documents and give testimony.. So long as it "may" relate to the intended purpose, discovery under § 7602 can even be in the nature of what appears to be a "fishing expedition" so long as arguably related to the stated purpose of the statute. *U.S. v. Giordano*, 419 F. 2d 564, 568 (8th Cir. 1969) ("Taxpayer in his brief characterized the Government's efforts as a 'fishing expedition.' If so, the Secretary or his delegate has been specifically licensed to fish by 7602."). Just as is the case with bankruptcy related litigation, such broad discovery is not available in the litigation that might arise between the government and the target of an investigation.

The types of litigation that might ensue are limited to litigation between the government and the taxpayer. That litigation will necessarily be in either the Tax

Court; the Court of Federal Claims; a United States District Court, including the affiliated bankruptcy courts; or state court. All of those forums have rules governing discovery that are far more restrictive and provide far more procedural safeguards for the litigants than those applicable under a §7602 summons. Here the parties are already litigating all issues relating to the tax returns identified in the summonses in the Tax Court. As in *Bennett*, *supra*, at 29-30 "it is difficult at this point, if not impossible, to determine whether and to what extent information gleaned from . . . [the requested examination] will not be related to the parties and subject matter covered by the [pleading in the pending litigation]."

As has been accepted with respect to Rule 2004 discovery for many years, it is obvious that permitting the use of §7602 discovery that has no other apparent legitimate purpose, but is clearly relevant to litigation pending between the government and a target of an examination, is inherently wrong. It fails to give due deference to the rules and procedures of the court in which the litigation is pending. It permits the government to obtain discovery that the rules of the court in which the litigation is pending would not permit. It subverts the entire court system by use of administrative procedures totally unregulated by the court charged with determination of the controversy between the parties. That should be the rule for examinations under §7602 as well.

Once a Tax Court case has been commenced, the Tax Court Discovery Rules, of which this Court has

taken notice, are similar to the Federal Rules of Civil Procedure, with the caveat that the Tax Court "expects the parties to attempt to attain the objectives of discovery through informal consultation or communication . . . " and depositions are exceptions, not the norm. Tax Ct. Rule 70(a). As the government admits in §25.5 . . . . of the Handbook, summonses under §7602 are not to be issued *after* the issuance of a Statutory Notice of Deficiency ("SND") (the functional equivalent of the FPAA here) or once Tax Court litigation commences, *as this would be deemed abusive.* In the instant case the FPAA was issued in December, 2010, in the same form as was signed on August 11, 2010, and Dynamo Holdings Limited Partnership ("DHLP") commenced Tax Court litigation by filing its Petition for Readjustment of Partnership Items Under Code Section 6226, assigned Docket number 2685-11 (the "Petition") on February 1, 2011. Although the summonses at issue here were issued before the FPAA, the government's attempt to enforce these summonses now, after no attempts when it could have done any good in the preparation of the FPAA, is obviously part of a design to evade the applicable Tax Court Discovery Rules. In this regard, there is no practical difference between summonses issued after an FPAA or SND which the IRS Manual prohibits, and summonses issued before the FPAA or SND but never sought to be enforced in time to use the information to prepare the FPAA or SND for the proper purpose of examining tax returns as we have here.

If the petitions are not dismissed summarily for the government's failure to cooperate in providing the Court with necessary evidence, at the very least, the Court should schedule a pretrial conference under Rule 16 for the purpose of formulating and simplifying the issues in this case, obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and to control and schedule discovery.

WHEREFORE, Movants, MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF BEEKMAN VISTA, INC., MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF DYNAMO HOLDINGS, INC., ROBERT JULIEN, and DYNAMO HOLDINGS LIMITED PARTNERSHIP respectfully move the Court, for alternative relief as follows: (1) pursuant to its inherent authority to control its own proceedings, to dismiss summarily the petitions to enforce IRS Summonses at issue in these consolidated cases for the government's failure to cooperate in providing evidence necessary to the proper determination of the issues; or, (2) pursuant to Fed. R. Civ. P. Rule 16, to schedule a pretrial conference for the purpose of formulating and simplifying the issues in the case, obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and to control and schedule discovery and award such other and further relief as may be appropriate under the circumstances.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 19, 2011, I electronically filed the foregoing document and Exhibits "A" through "H" with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF.

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APPENDIX I

1. 26 U.S.C. 6201(a) (Supp. V 2011) provides in pertinent part:

Assessment authority

(a) Authority of Secretary

The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law.

* * * * *

2. 26 U.S.C. 7601(a) provides:

Canvass of districts for taxable persons and objects

(a) General rule

The Secretary shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

3. 26 U.S.C. 7602 provides:

Examination of books and witnesses

(a) Authority to summon, etc.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(b) Purpose may include inquiry into offense

The purposes for which the Secretary may take any action described in paragraph (1), (2), or (3) of subsection (a) include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

(c) Notice of contact of third parties

(1) General notice

An officer or employee of the Internal Revenue Service may not contact any person other than the taxpayer with respect to the determination or collection of the tax liability of such taxpayer without providing reasonable notice in advance to the taxpayer that contacts with persons other than the taxpayer may be made.

(2) Notice of specific contacts

The Secretary shall periodically provide to a taxpayer a record of persons contacted during such period by the Secretary with respect to the determination or collection of the tax liability of such taxpayer. Such record shall also be provided upon request of the taxpayer.

(3) Exceptions

This subsection shall not apply—

(A) to any contact which the taxpayer has authorized;

(B) if the Secretary determines for good cause shown that such notice would jeopardize

collection of any tax or such notice may involve reprisal against any person; or

(C) with respect to any pending criminal investigation.

(d) No administrative summons when there is Justice Department referral

(1) Limitation of authority

No summons may be issued under this title, and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person.

(2) Justice Department referral in effect

For purposes of this subsection—

(A) In general

A Justice Department referral is in effect with respect to any person if—

(i) the Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws, or

(ii) any request is made under section 6103(h)(3)(B) for the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person.

(B) Termination

A Justice Department referral shall cease to be in effect with respect to a person when—

(i) the Attorney General notifies the Secretary, in writing, that—

(I) he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws,

(II) he will not authorize a grand jury investigation of such person with respect to such an offense, or

(III) he will discontinue such a grand jury investigation,

(ii) a final disposition has been made of any criminal proceeding pertaining to the enforcement of the internal revenue laws which was instituted by the Attorney General against such person, or

(iii) the Attorney General notifies the Secretary, in writing, that he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws relating to the request described in subparagraph (A)(ii).

(3) Taxable years, etc., treated separately

For purposes of this subsection, each taxable period (or, if there is no taxable period, each taxable event) and each tax imposed by a separate chapter of this title shall be treated separately.

(e) Limitation on examination on unreported income

The Secretary shall not use financial status or economic reality examination techniques to determine the existence of unreported income of any taxpayer unless the Secretary has a reasonable indication that there is a likelihood of such unreported income.

OPPOSITION BRIEF

FILED
DEC - 6 2013

No. 13-301

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

MICHAEL CLARKE, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Under *United States* v. *Powell*, 379 U.S. 48 (1964), an individual or entity that receives an IRS summons is entitled to the opportunity to show at an adversary hearing, that the summons should be quashed because judicial enforcement of the summons would constitute an abuse of the court's processes—including, for example, if the summons was issued by the IRS for an improper purpose.

The question presented is whether the court of appeals erred in ruling, on the facts of this case, that in light of respondents' substantial allegations that the IRS had issued summonses to them for an improper purpose, respondents should have a hearing at which they could examine IRS officials about the purpose for which the summonses were issued.

CORPORATE DISCLOSURE STATEMENT

Dynamo Holdings Limited Partnership is a limited partnership whose general partner is Dynamo Holdings, Inc. No publicly held company holds 10% or more of the stock in Dynamo Holdings, Inc.

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OTHER AUTHORITIES

Hyman, David A., *Procedural Intersection and Special Pleading: Is Tax Different?*, 71 Tulane L. Rev. 1729 (1997) 28

Hyman, David A., *When Rules Collide: Procedural Intersection and the Rule of Law*, 71 Tulane L. Rev. 1389 (1997) 28

IN THE

Supreme Court of the United States

No. 13-301

UNITED STATES OF AMERICA,

Petitioner,

v.

MICHAEL CLARKE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

INTRODUCTION

The United States seeks review of an unpublished, per curiam decision in which the court of appeals applied its prior published decision in *Nero Trading, LLC* v. *U.S. Dep't of Treasury, IRS*, 570 F.3d 1244, 1249 (11th Cir. 2009), a decision that the government did not deem worthy of a petition for certiorari. The government had good reason not to seek certiorari in *Nero*. All that decision requires of the Internal Revenue Service ("IRS") is that, on a handful of occasions each year, it make available for a hearing the IRS agents who issued investigative summonses under 26 U.S.C. § 7602. *Nero* is entirely consistent with this Court's decision in *United States* v. *Powell*, 379 U.S. 48 (1964), and with decisions of other circuits. Indeed, as the government recognizes, there is a consensus that district courts always

have discretion to require the IRS to justify enforcement of a summons at an evidentiary hearing. Moreover, the ruling in *Nero* was derived from an indistinguishable proposal advocated by the government itself.

At most, then, then government's complaint in this case is that the Eleventh Circuit ordered the district court to do something that, it concedes, the district court could have decided to do itself: hold a hearing. Although the government believes that respondents did not make a showing sufficient to warrant such a hearing, that factbound disagreement with the decision below does not warrant this Court's review. The mere fact that two lower courts disagreed about whether respondents' showing met the threshold required for a hearing does not warrant this Court's intervention.

Moreover, this case does not present a suitable occasion for the Court to consider the government's contentions. Respondents presented substantial evidence that the IRS was improperly using the summons procedure to gain more expansive discovery than that permitted under the Tax Court rules. The Eleventh Circuit's conclusion that respondents had provided sufficient evidence to merit further inquiry at an adversary hearing should therefore be sustained even under the approach the government puts forward, and the government's disagreement with that decision is largely academic.

STATEMENT

1. The IRS conducted an examination of the tax returns of Dynamo Holdings Limited Partnership ("DHLP") for the tax years 2005-2007. Pet. App. 11a. As a general matter, the IRS has three years in which to examine and definitively fix a taxpayer's tax liability. *See* 26 U.S.C. § 6501. DHLP agreed to extend that lim-

itations period twice, so that the IRS's investigation of tax years 2005 and 2006 remained timely.

On August 11, 2010, as the extended limitations period drew to a close, the investigating IRS agent, Mary Fierfelder, signed a Final Partnership Administrative Adjustment ("FPAA") which set forth the IRS's position as to DHLP's tax liability for 2005-2007. Docket Entry 7-2, at 5.[1] As the name suggests, an FPAA represents the IRS's "final" position as to the taxpayer's liability. *See Sealy Power, Ltd.* v. *Commissioner*, 46 F.3d 382, 385-386 (5th Cir. 1995) ("[T]he FPAA ... serve[s] to notify affected taxpayers that the Commissioner has made a final administrative determination of their liability for particular tax years."); *see also* 26 U.S.C. §§ 6221-6223. Once the IRS issues an FPAA, the taxpayer can seek judicial review of the IRS's determination in Tax Court, and the matter then shifts from the administrative sphere to the courtroom. The IRS's own Summons Handbook makes clear that, once a taxpayer's liability has been finally determined, the IRS should no longer be issuing summonses to investigate the returns in question because "the examination has been concluded," and "[t]he Service should no longer be in the process of gathering the data to support a determination[.]" DE 20-7 (Ex. F) (Handbook § 25.5.4.4.8).[2]

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[1] Docket Entry ("DE") refers to the district court's docket in the lead case, *United States* v. *Clarke*, No. 11-mc-80456 (S.D. Fla.), unless otherwise noted. *See* DE 18, designating *Clarke* as lead case and requiring motions and other papers to be filed in lead case only.

[2] The quoted passage of the Handbook discusses statutory notices of deficiency ("SND"), not FPAAs. But as the government acknowledges, a statutory notice of deficiency serves the same purposes for individuals as an FPAA does for partnerships. Pet. 5. *See also Sealy Power*, 46 F.3d at 385-386 (noting the functional equivalence of FPAAs and SNDs).

The IRS once again requested, however, that DHLP agree to extend the limitations period for tax years 2005-2007. DHLP declined. DE 7-1 ¶ 9. Shortly thereafter, in September and October 2010—and despite having signed the FPAA and not having asked for additional information for some time—Agent Fierfelder issued investigative summonses pursuant to 26 U.S.C. § 7602 to six additional parties, including five of the respondents here. Pet. App. 11a, 21a, 32a, 43a, 54a.[3] Those summonses called for the production of documents and testimony regarding DHLP's 2005-2007 tax returns. The summonses had return dates of October 25, 2010 (for four of the summoned respondents) and December 3, 2010 (for respondent Robert Julien). Pet. App. 11a, 21a, 32a, 43a, 54a. Those five respondents declined to comply with the summonses. Pet. App. 11a-12a, 21a-22a, 32a-33a, 43a-44a, 54a-55a. The sixth summoned person, Christine Moog, initially refused to comply with the summonses, but ultimately complied and was interviewed in September 2011. DE 20-2 ¶ 7.

On December 28, 2010, with three days remaining to the statutory limitations period, the IRS issued, unaltered, the FPAA signed by Agent Fierfelder in August 2010. DE 7-2, at 1.

2. On February 1, 2011, DHLP commenced a proceeding in the United States Tax Court challenging the FPAA. Pet. App. 12a; *see also* 26 U.S.C. § 6226(a). The

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[3] The respondents who received IRS summonses in 2010 are Michael Clarke, as Chief Financial Officer of Beekman Vista, Inc.; Michael Clarke, as Chief Financial Officer of Dynamo GP, Inc.; Rita Holloway, as trustee for the 2005 Christine Moog Family Delaware Dynasty Trust; Marc Julien, as trustee for the 2005 Robert Julien Delaware Dynasty Trust; and Robert Julien. The sixth respondent in this Court is DHLP itself, which was permitted to intervene in the summons enforcement proceeding. DE 15.

Tax Court imposes significant limitations on the scope of discovery available to both the taxpayer and the government. *See* Tax Court Rule 70(a) ("Discovery is not available under these Rules through depositions except to the limited extent provided in Rule 74."). In particular, the Tax Court treats non-consensual deposition as "an extraordinary method of discovery." Tax Court Rule 74(c)(B).

3. On April 28, 2011, six months after the return date for most of the summonses, and almost three months after DHLP commenced its suit in Tax Court, the IRS instituted a proceeding in district court for enforcement of the summonses. Pet. App. 10a, 20a, 31a, 42a, 53a; *see also* 26 U.S.C. § 7402 (authorizing district courts to hear summons enforcement proceedings). Respondents contended that, under *United States* v. *Powell*, 379 U.S. 48 (1964), enforcement should be denied and the summonses quashed because they had not been issued and were not being enforced for a proper investigative purpose.[4] Consistent with Eleventh Circuit precedent, respondents requested an evidentiary hearing at which they could inquire into and make a record about the government's purpose in issuing the summonses.[5] They also asked for pre-hearing discovery.[6]

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[4] *See* DE 7; *United States* v. *Clarke*, No. 11-mc-80457 (S.D. Fla.), DE 14; *United States* v. *Holloway*, No. 11-mc-80459 (S.D. Fla.), DE 10; *United States* v. *Julien*, No. 11-mc-80460 (S.D. Fla.), DE 12; *United States* v. *Julien*, No. 11-mc-80461 (S.D. Fla.), DE 7 (responses to motion to enforce); DE 20 (motion for summary dismissal).

[5] DE 7, at 7; *Clarke*, No. 11-mc-80457, DE 14, at 7; *Holloway*, No. 11-mc-80459, DE 10, at 9; *Julien*, No. 11-mc-80460, DE 12, at 9; *Julien*, No. 11-mc-80461, DE 7, at 7; Pet. App. 65a, 71a-75a.

Respondents offered several specific and substantial allegations indicating that the IRS may have issued and sought enforcement of the summonses for improper reasons. Specifically, they alleged that the summonses had been issued as retribution for DHLP's refusal to grant a further extension of the applicable statute of limitations.[7] Respondents also alleged that the IRS was abusing the district court's processes by enforcing the summonses for the purpose of circumventing the Tax Court restrictions on discovery.[8] Respondents did not rest on bare allegations, but rather supported these allegations with the competent evidence available to them without discovery. For example, they submitted a declaration from respondent Michael Clarke who confirmed that the summonses were issued "immediately" after DHLP refused to extend the limitations period. DE 8-1 ¶ 9; *Clarke*, No. 11-mc-80457, DE 15 ¶ 9; *Julien*, No. 11-mc-80461, DE 8 ¶ 9; Pet. App. 73a. And they submitted a declaration from attorney Richard Sapinski, who represented Christine Moog when she appeared in compliance with her IRS summons, and who stated that Moog's interview by the IRS was conducted

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[6] DE 7, at 7; *Clarke*, No. 11-mc-80457, DE 14, at 7; *Holloway*, No. 11-mc-80459, DE 10, at 9; *Julien*, No. 11-mc-80460, DE 12, at 9; *Julien*, No. 11-mc-80461, DE 7, at 7; Pet. App. 65a, 71a-75a.

[7] DE 7, at 5; *Clarke*, No. 11-mc-80457, DE 14, at 5; *Holloway*, No. 11-mc-80459, DE 10, at 6; *Julien*, No. 11-mc-80460, DE 12, at 6; *Julien*, No. 11-mc-80461, DE 7, at 5; Pet. App. 72a-75a.

[8] DE 7, at 6-7; *Clarke*, No. 11-mc-80457, DE 14, at 6-7; *Holloway*, No. 11-mc-80459, DE 10, at 7-8; *Julien*, No. 11-mc-80460, DE 12, at 7-8; *Julien*, No. 11-mc-80461, DE 7, at 6-7; Pet. App. 72a-75a. Respondents further alleged that the summonses had been issued as a subterfuge to gather information related to another entity. DE 7, at 4; *Clarke*, No. 11-mc-80457, DE 14, at 4-5; *Holloway*, No. 11-mc-80459, DE 10, at 5-6; *Julien*, No. 11-mc-80460, DE 12, at 5-6; *Julien*, No. 11-mc-80461, DE 7, at 4-5; Pet. App. 72a-75a.

exclusively by the two attorneys representing the IRS in the Tax Court proceeding and that Agent Fierfelder did not even attend. DE 20-2 (Ex. B) ¶ 11.

Respondents also submitted several filings from the Tax Court case supporting their contention that the IRS was using the summonses not to assist the IRS in the administrative process of determining DHLP's tax liability, but rather as an improper form of discovery for the Tax Court litigation. For instance, the IRS refused to consent in referral of the Tax Court proceeding to IRS Appeals (a process similar to mediation) on the ground that the case is not "fully factually developed," due to respondents' noncompliance with the summonses "issued during the exam of [DHLP]." DE 20-3 (Ex. C). The IRS also opposed DHLP's motion for a protective order in Tax Court, in part because the respondents had declined to comply with the summonses. DE 20-4 (Ex. D) ¶ 8. And the IRS sought a continuance of the Tax Court case on the ground that the summonses were outstanding. DE 20-6 (Ex. E).

Respondents further pointed to the IRS's own Summons Handbook, which, as noted, disapproves of the issuance of summonses once a final determination of tax liability has been made. Pet. App. 70a-71a. Respondents argued that the IRS's conduct in this case constituted a departure from the principles recognized in the Handbook and that this departure was suggestive of the IRS's improper purpose in issuing the summonses. Pet. App. 68a-72a.

4. The district court denied the motions to quash the summonses and ordered enforcement. Pet. App. 19a, 29a, 40a, 51a, 62a. The court concluded that the respondents had made only a "naked assertion" that the summonses had been issued in retaliation for DHLP's refusal to extend the limitations period. Pet. App. 14a;

24a; 35a; 46a; 57a. It further concluded that even if the IRS was retaliating against respondents, that had "no bearing" on whether the summonses should be enforced. Pet. App. 14a-15a; 24a-25a; 35a-36a; 46a-47a; 57a-58a. The district court also held, primarily on the basis of an out-of-circuit case, that as a matter of law, use of the summons process to avoid limits on discovery in Tax Court would not constitute grounds for quashing a summons. Pet. App. 15a, 25a, 36a, 47a, 58a.

5. The court of appeals reversed in part, in a per curiam, unpublished decision. Applying the controlling Eleventh Circuit standard from *Nero Trading, LLC* v. *U.S. Dep't of Treasury, IRS*, 570 F.3d 1244, 1249 (11th Cir. 2009), the court concluded that respondents should have a limited evidentiary hearing at which they can seek to establish the IRS's bad faith. Pet. App. 5a. The court reached this conclusion after a "careful review of the record" revealed that the respondents had plausibly alleged an improper purpose behind the issuance of the summonses. Pet. App. 3a. On that basis, the court directed that the respondents should be afforded an opportunity to examine IRS officials regarding the IRS's purpose in issuing the summonses. *See* Pet. App. 6a. The court denied, however, respondents' request for pre-hearing discovery. Pet. App. 5a n.3.

ARGUMENT

In *United States* v. *Powell*, 379 U.S. 48 (1964), this Court recognized that the IRS does not have an unfettered right under Section 7402(b) to enforce a summons requiring a taxpayer to produce testimony or records. Rather, because "[i]t is the court's process which is invoked to enforce the administrative summons," the court should deny enforcement where allowing enforcement would "permit its process to be abused." *Id.*

at 58. As a mechanism for determining whether a particular enforcement proceeding is abusive, the *Powell* Court adopted a burden-shifting framework. The IRS bears the initial burden to produce evidence of good faith (normally a sworn declaration). *Id.* To avoid enforcement, the taxpayer must then raise a "substantial question" as to whether enforcement would be abusive. *Id.* at 51. If the taxpayer does so, it is then "entitled" to an "adversary hearing ... before enforcement is ordered," at which it "may challenge the summons on any appropriate ground." *Id.* at 58 (internal quotation marks omitted).

The narrow issue presented by the petition is whether, on the specific facts of this case, respondents are entitled to a limited evidentiary hearing—but not any other form of discovery—to help them obtain the evidence needed to carry that burden. That question is of limited significance and does not warrant this Court's review. The government does not dispute that the district court would have been authorized to hold such a hearing in this case, and quarrels only with the fact that the court of appeals directed it to do so. The hearing ordered by the court of appeals in this case is entirely consistent with *Powell*, which made clear that a taxpayer that has a substantial claim of abuse by the IRS should have the opportunity to demonstrate that enforcement of an IRS summons would be unwarranted. Moreover, the government makes no persuasive showing that the court of appeals' decision will impair the enforcement of the tax laws, which is not surprising given that the decision is likely to affect only a handful of cases each year and that the government did not seek review of the Eleventh Circuit's earlier decision in *Nero*, which the court of appeals applied in this case. The Court should therefore deny review.

A. The Eleventh Circuit's Approach To Summons Enforcement Does Not Unduly Burden The Government And Does Not Significantly Diverge From That Of Other Circuits

The government contends that, in the decision below, the Eleventh Circuit adopted a rule that a summons recipient is entitled to an evidentiary hearing based on any bare allegation of improper motive on the part of the IRS in issuing the summons, and that this requirement will seriously burden the government and impair enforcement of the tax laws. These assertions are unfounded.

1. As an initial matter, the decision below, which is unpublished, did not establish any new law in the Eleventh Circuit and did not alter the standard in that circuit as to when a taxpayer is entitled to an evidentiary hearing. Rather, the controlling precedent, which the court of appeals panel followed, is *Nero Trading, LLC* v. *U.S. Dep't of Treasury, IRS*, 570 F.3d 1244, 1249 (11th Cir. 2009), a case in which the government did not petition for certiorari. *Nero* held that a substantial "allegation of improper purpose is sufficient to trigger a limited adversary hearing where the taxpayer may question IRS officials concerning the Service's reasons for issuing the summons," and that the taxpayer is not to be denied a hearing merely because, at the threshold stage before any record has been developed, the crucial evidence remains in the hands of the government. *Id.* at 1249. However, *Nero* also emphasized that its decision did "not categorically strip district courts of their discretionary power to determine whether an adversarial hearing is appropriate." *Id.* Rather, *Nero* left room for district courts to deny even a limited evidentiary hearing where (for example) the taxpayer's allegations, even if true, would not provide

grounds for quashing the summons, or where denial of a hearing would not deprive the taxpayer of its sole means of proving the truth of its allegations. *Id.* at 1249 & n.3. *Nero* also emphasized that only a limited evidentiary hearing is presumptively available, and that other more intrusive and burdensome forms of discovery, by contrast, are not. *Id.* at 1249.

The court in *Nero* reversed a denial of a motion to quash a summons where the taxpayer had not received a limited evidentiary hearing. However, it did not do so on the ground that the taxpayer was categorically entitled to such a hearing, but rather only because the district court "did not explain its decision to not hold an evidentiary hearing," which precluded proper appellate review. 570 F.3d at 1250-1251. *Nero* also affirmed the denial of a motion to quash a summons as to a taxpayer who had received the opportunity to cross-examine the IRS agent who had issued that summons, even though that taxpayer had sought and been denied the opportunity to examine several other witnesses. *Id.*

Nero thus makes clear that, even when a taxpayer has the right to an adversary hearing to challenge enforcement of an IRS summons, the district courts retain significant discretion to structure the hearing (including to deny one when appropriate) and to restrict other discovery to ensure that the IRS's tax enforcement efforts are not impeded. The unpublished, per curiam decision below applied *Nero* to a particular set of facts. It did not (and could not) purport to alter the rule in the Eleventh Circuit. *E.g.*, *Cargill* v. *Turpin*, 120 F.3d 1366, 1386 (11th Cir. 1997). Thus, contrary to the government's contention, the decision below did not strip district courts in the Eleventh Circuit of the power to deny a limited evidentiary hearing to the extent allowed by *Nero*.

2. The government overstates the burden it faces under the Eleventh Circuit's approach to summons enforcement. Neither *Nero* nor the decision below opens up the government to intrusive inquiries based on speculation about governmental motive. The Eleventh Circuit carefully spares the government the "panoply of expensive and time-consuming pretrial discovery devices" available in other litigation. Pet. App. 5a n.3 (quoting *Nero*, 570 F.3d at 1249). And under *Nero*, the district court also retains substantial discretion to limit the scope of the evidentiary hearing as appropriate. *See Nero*, 570 F.3d at 1249 ("Generally, the scope of any adversarial hearing in this area is left to the discretion of the district court."); *id.* at 1250 ("[B]ecause the district court at least allowed a limited adversarial hearing, albeit a truncated one, we cannot find that the district court abused its discretion.").

What *Nero* did hold, and what the decision below recognized, is that, when a taxpayer (or other summoned person) has a substantial basis for alleging that enforcement of an IRS summons would be abusive, but the critical evidence supporting that contention remains in the hands of the government, the taxpayer should have a limited opportunity to establish its case by questioning appropriate witnesses from the government about the purpose for the summons. That kind of hearing will ordinarily impose no greater burden on the government than having to produce officials who can testify regarding the issuance of the summons. There is no reason that this should lead to any substantial delay in summons enforcement where the taxpayer's objections are not meritorious. Indeed, even though *Nero* was decided in 2009, the government has not pointed to anything suggesting that *Nero* has resulted in any significant delay in enforcement of legiti-

mate summonses within the Eleventh Circuit, or that it has been subjected to a torrent (or even a trickle) of challenges to IRS summonses.[9]

The government also overstates the frequency with which these issues arise. Even if hundreds of summonses are issued in the Eleventh Circuit each year (Pet. 19), the overwhelming majority are either undoubtedly complied with or never enforced. A Westlaw search indicates that district courts in the Eleventh Circuit adjudicate around five cases involving enforcement of IRS summonses each year, and there has been no discernible increase in that number since *Nero* was decided. Even if Westlaw searches are underinclusive, the evidence does not suggest that the issue arises with such frequency that it will present any serious difficulty for the IRS.

3. Moreover, the government itself previously advocated for exactly the approach adopted in *Nero*—confirming that it will not be unduly burdensome for tax enforcement. After this Court's decision in *Powell*, courts grappled with how to allow taxpayers to have a meaningful opportunity to challenge an IRS summons (as *Powell* requires) while also ensuring that enforcement proceedings remained streamlined. The government's guidance was that the courts should do exactly what the Eleventh Circuit has done. Thus, the government successfully argued in *United States* v. *Salter*, 432 F.2d 697 (1st Cir. 1970), that

> [t]he general solution would probably be for the district court to proceed directly to a hearing at

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[9] While the government complains of the potential for the taxpayer to cause delay, here, it was the government itself that waited some six months between the return date of the summonses and the commencement of enforcement proceedings.

> which, if desired, the summonee could examine the agent who issued the summons, concerning his purpose. The court could then, by observation and, where necessary, its own questioning of the agent, make its own determination of whether exploration, as by discovery, seemed to be in order.

Id. at 700 (quoting brief of the government). The government also successfully urged this approach before the Ninth Circuit in *United States* v. *Church of Scientology of California*, 520 F.2d 818, 824 (9th Cir. 1975).

Thus, the government itself has endorsed an approach that distinguishes between a limited evidentiary hearing—which should be available in cases where substantial allegations of improper purpose have been made—and discovery, which would only be available after the taxpayer has put forth evidence of the government's bad faith (which might become available at the limited hearing).[10] This is precisely the balance struck in *Nero*, and thus, the government can hardly complain that it imposes unreasonable burdens.[11]

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[10] To obtain even that limited hearing, the taxpayer would have to raise defenses that would provide colorable grounds for quashing the summons. Where the taxpayer fails to plead facts that, even if taken as true, would provide grounds for quashing the summons, the district court may deny the taxpayer an evidentiary hearing. *See Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 324 n.7 (1985).

[11] *Nero* is in fact directly traceable to the government's proposal in *Salter*. The Fifth Circuit explicitly adopted *Salter* in *United States* v. *Harris*, 628 F.2d 875, 883 (5th Cir. 1980) ("We sanction the procedure stated by the First Circuit in *Salter*."), and then followed *Harris* in *United States* v. *Southeast First Nat'l Bank of Miami Springs*, 655 F.2d 661 (5th Cir. 1981). As noted *infra*, *Nero* merely reaffirmed *Southeast*.

4. The government also overstates the differences among the circuits as to what a taxpayer must produce to obtain an evidentiary hearing. While some courts of appeals have articulated the standard somewhat differently, the substance in the overwhelming majority of the circuits is not significantly different, and certainly not so different that this Court's intervention is warranted.

First, it bears emphasis that the divergence the government describes concerns only when a district court is *required* to hold an evidentiary hearing. The government acknowledges that, under *Powell*, "a district court has discretion to order an evidentiary hearing" based on allegations of IRS bad faith. *See* Pet. 20. Thus, the government accepts that, had the district court decided to conduct an evidentiary hearing in this case, it would have no basis for complaint. The government objects only that the court of appeals required the district court to do something it could have done on its own anyway. This is significant because even the government's approach would not result in uniformity across the country; the procedure followed in any specific case would necessarily depend on the judgment of the particular district judge as to whether a hearing was warranted.

The government also errs in arguing that the Fifth Circuit has adopted a different rule from that of the Eleventh Circuit. *Nero* broke no new ground, but rather followed the old Fifth Circuit's holding in *United States* v. *Southeast First Nat'l Bank of Miami Springs*, 655 F.2d 661 (5th Cir. 1981).[12] *See Nero*, 570 F.3d at 1249-1250 (describing *Southeast* as "the legitimate off-

[12] The Eleventh Circuit has adopted as precedent Fifth Circuit decisions issued before October 1, 1981. *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

spring of ... *Powell*" and block-quoting it at length). That decision remains the law in the Fifth Circuit.[13] The government cites *Zugerese Trading LLC* v. *IRS*, 336 F. App'x 416 (5th Cir. 2009), for the proposition that the Fifth Circuit has adopted a different rule, but that unpublished decision did not purport to and could not overturn *Southeast*. *Zugerese* merely says that the taxpayer must raise a "substantial question" of bad faith to obtain an evidentiary hearing, but does not address whether that "substantial question" can be raised via pleading or whether it must be supported with evidence. And all *Zugerese* holds is that no evidentiary hearing is required when the taxpayer's allegations were aimed at the *merits* of the tax issue and not the good faith of the IRS in issuing the summons. *Id.* That ruling is merely a straightforward application of this Court's holding in *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310 (1985), that no evidentiary hearing is warranted where the taxpayer has not alleged proper grounds for quashing the summons, *see supra* note

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[13] The government erroneously implies (Pet. 18 n.3) that *Southeast* did not survive the enactment of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324. TEFRA changed the standard for establishing the particular form of bad faith at issue in *Southeast*, but that decision provided a general framework for adjudicating taxpayer allegations of IRS bad faith, not just allegations that the government was misusing Section 7602 for criminal discovery. *See, e.g.*, *Nero*, 570 F.3d at 1250 n.4 (improper purpose not limited to the issuance of a summons to further a criminal investigation); *United States* v. *Millman*, 822 F.2d 305, 308 (2d Cir. 1987) (addressing standard applicable in deciding whether IRS acts with some "other improper motive or purpose").

10, and is wholly consistent with *Nero*, *see* 570 F.3d at 1249 n.3.[14]

The government also errs in arguing that the Eleventh Circuit's rule diverges from that in the First and Ninth Circuits. As noted above, both circuits have held—adopting arguments by the government—that a taxpayer should have an evidentiary hearing (but not additional pretrial discovery) to examine the question of IRS bad faith if it makes sufficiently specific and substantial allegations tending to show that the IRS issued a summons for an improper purpose. The government suggests that those circuits have retreated from those decisions in later opinions, but in fact, neither the First Circuit's decision in *Salter* nor the Ninth Circuit's decision in *Church of Scientology* has been overruled or reconsidered.

The First Circuit has stated, in a footnote in a later case, that "the taxpayer must do more than allege an improper purpose: he must introduce evidence to support his allegations." *Copp* v. *United States*, 968 F.2d 1435, 1438 n.1 (1st Cir. 1992). For that point, *Copp* cit-

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[14] In one unpublished, nonprecedential Fifth Circuit case, that court held that a taxpayer had failed to establish his entitlement to an adversary hearing to establish the government's bad faith. *See Mitchell* v. *Thomas*, 239 F. App'x 56, 57 (5th Cir. 2007). But that decision refers only to "conclusory assertions" of bad faith by the taxpayer, and emphasized that the taxpayer must "raise in a substantial way the existence of substantial deficiencies in the summons proceedings." *Id.* (quoting *Harris*, 628 F.2d at 879). Neither *Nero* nor the decision below suggests otherwise; and the *Mitchell* case did not hold that the taxpayer must be able to adduce admissible *evidence* of government bad faith before obtaining an adversary hearing. In any event, *Mitchell*, which does not even cite *Southeast*, could not overrule Fifth Circuit precedent. *See Jimenez* v. *Wood Cnty.*, 621 F.3d 372, 376 (5th Cir. 2010). *Southeast* remains the law in the Fifth Circuit.

ed *Salter*, but in fact *Salter* held that the taxpayer will not invariably be required to adduce evidence to obtain a hearing, especially where the critical evidence is likely to be in the hands of the government, as long as the taxpayer's allegations are substantial and nonconclusory. *See* p. 14, *supra*. The First Circuit's sentence in *Copp* likely reflected the insubstantiality of the allegations of bad faith in that case. And *Copp* gives no indication that it intended to diverge from or reconsider the more considered discussion of the showing necessary for an evidentiary hearing set forth in *Salter*.[15]

As for the Ninth Circuit, that court stated in *United States* v. *Samuels, Kramer & Co.*, 712 F.2d 1342 (9th Cir. 1983), that a taxpayer should have an evidentiary hearing when it "is able to make a sufficient showing of bad faith on the Government's part," *id.* at 1346-1347, such as "responsive pleadings, supported by affidavits, that allege *specific facts* in rebuttal," *id.* at 1348. But that approach is not significantly different from the Eleventh Circuit's; neither court allows an evidentiary hearing based on conclusory allegations of bad faith not supported by reference to any facts that might sustain a finding of bad faith on the part of the government.

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[15] *Copp*'s statement of the applicable rule was later repeated in *Sugarloaf Funding, LLC* v. *United States Dep't of Treasury*, 584 F.3d 340, 351 (1st Cir. 2009). But in that case, the First Circuit ruled that the taxpayer's allegations of IRS bad faith were *legally* insufficient. *See id.* at 348-350. The case therefore did not ultimately turn on whether the taxpayer had made a factual showing that was sufficient to warrant a hearing. The First Circuit cited both *Salter* and *Copp* in *United States* v. *Gertner*, 65 F.3d 963 (1st Cir. 1995), but that case did not turn on what showing (if any) the taxpayer must make to obtain an evidentiary hearing; in that case the district court ruled in favor of the *taxpayer* without holding a hearing, and the court of appeals rejected the government's argument that such a hearing was required. *Id.* at 969.

Indeed, the Ninth Circuit in that case reversed the district court's order enforcing the summonses and remanded the case for exactly the kind of "limited evidentiary hearing" that the court in *Church of Scientology* had indicated would be appropriate. *See id.* at 1344, 1348. The subsequent decision in the Ninth Circuit cited by the government makes clear that the showing required of the taxpayer for this kind of limited evidentiary hearing is not overly demanding. *See Fortney* v. *United States*, 59 F.3d 117, 121 (9th Cir. 1995) (taxpayer must provide "'minimal amount of evidence'"). This standard is more than satisfied by the affidavits submitted by respondents.[16]

The approach taken in the Sixth Circuit is in accord with that of the First and Ninth Circuits. In *United States* v. *Will*, 671 F.2d 963 (6th Cir. 1982), the Sixth Circuit considered a taxpayer's appeal of a summons enforcement order, which the district court granted after allowing the taxpayer to cross-examine the IRS agent who had issued the summons. In ruling that the district court did not improperly curtail cross-examination, the Sixth Circuit—citing the Ninth Circuit's decision in *Church of Scientology*—explained that an adversary proceeding is "of a summary nature: a summonee, bearing the burden of proving bad faith, harassment, or some other abuse, must only *be afforded an opportunity to substantiate his allegations*." *Id.* at

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[16] Since *Salter* and *Church of Scientology* were decided, TEFRA was enacted and this Court has reaffirmed that summons enforcement proceedings should be summary in nature, *see United States* v. *Stuart*, 489 U.S. 353, 369 (1989), but none of those intervening events undermined those decisions or eroded the core holding of *Powell*, implemented through those decisions, that a taxpayer is entitled to a meaningful opportunity to raise a substantial question as to the government's good faith.

968 (emphasis added). But as that language shows, the Sixth Circuit indicated no doubt that a taxpayer should have an opportunity to substantiate tenable allegations of IRS bad faith, and it cited approvingly (*id.*) its prior unpublished decision in *United States* v. *Joseph*, 75-1 USTC P 9369, 1975 U.S. App. LEXIS 15937 (6th Cir. Feb. 25, 1975) (No. 74-7006), which reversed a district court's enforcement of a summons without giving the taxpayer the opportunity to create a record about the bad faith of the IRS in issuing the challenged summons. Thus, the Sixth Circuit has struck the same balance as have the First, Fifth, Ninth, and Eleventh Circuits: A taxpayer who has made substantial allegations of IRS bad faith should ordinarily have the opportunity to substantiate those allegations at an adversary hearing (including by cross-examination where appropriate), but the district court has significant discretion in holding that hearing, and further discovery is presumptively unavailable at least until after the hearing.[17]

Nor does *Nero* substantially diverge from the approach taken in the Third and Seventh Circuits. In those circuits, the taxpayer must provide evidence of bad faith in order to obtain an evidentiary hearing, but

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[17] The government claims (Pet. 16) that the Sixth Circuit's unpublished decision in *Phillips* v. *United States*, No. 98-3128, 1999 WL 228585 (6th Cir. Mar. 10, 1999), adopted a stricter standard. But the primary authority cited in *Phillips* was *Will*—which, as noted, made clear that a taxpayer should have the opportunity to substantiate his allegations at an evidentiary hearing. *Phillips* also cited *United States* v. *Ernst & Whinney*, 750 F.2d 516, 518 (6th Cir. 1984). But *Ernst & Whinney* followed precisely the procedure endorsed in *Nero*. The district court "deferred" consideration of the taxpayer's request to "undertake detailed discovery" until after an evidentiary hearing (*id.*), and the taxpayer was then allowed "to cross-examine the official who issued the summons at the enforcement hearing" (*id.* at 520).

those circuits—unlike the Fifth and Eleventh Circuits—correspondingly require the government to provide certain forms of pre-hearing discovery that would give the taxpayer the materials necessary to meet this evidentiary hurdle. *See United States* v. *Garden State Nat'l Bank*, 607 F.2d 61, 71 (3d Cir. 1979); *United States* v. *Kis*, 658 F.2d 526, 540 (7th Cir. 1981).[18] Thus, while the specific procedures used in those circuits differ somewhat from the approach taken in *Nero*, they, like the Eleventh Circuit, have adopted a mechanism by which the taxpayer may obtain limited discovery to assist it in shouldering its burden under *Powell*. The government does not question the propriety of this approach. This further confirms that the courts of appeals generally agree that a taxpayer or summoned entity that makes a substantial allegation of bad faith on the part of the IRS should have access to some form of limited discovery so that it can have a meaningful opportunity to prove its allegation.

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[18] Specifically, the Third and Seventh Circuits have adopted a procedure whereby the taxpayer is aided by the provision of "basic discovery." *See Garden State*, 607 F.2d at 71; *Kis*, 658 F.2d at 540. The specific discovery that the government must provide under those decisions was tailored to the particular form of bad faith recognized by this Court in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978). *LaSalle Bank* was subsequently legislatively overruled by TEFRA. Those courts have not specifically addressed whether this "basic discovery" remains available post-TEFRA for other kinds of allegations of bad faith. *See Moutevelis* v. *United States*, 727 F.2d 313, 315 (3d Cir. 1984) (declining to award taxpayer basic discovery where he alleged only that government's improper purpose was furtherance of criminal investigation, but suggesting that basic discovery might otherwise be available for other purposes). The reasoning of those decisions, however, suggests no basis to conclude that such basic discovery would not be available to the taxpayer or summoned entity based on a substantial allegation of bad faith.

Some circuits appear to use more stringent language to articulate the standard for when a taxpayer is entitled to an evidentiary hearing, but even those circuits do not in practice employ an approach that differs significantly from that of the Eleventh Circuit.[19] Thus, although some circuits have noted that an evidentiary hearing is not invariably required when a taxpayer alleges bad faith and have stated that a taxpayer must ordinarily put forward some evidence (rather than bare allegations) of IRS bad faith to obtain such a hearing, even in those circuits it is generally sufficient for the taxpayer to provide its own affidavits substantiating its allegations of bad faith, as long as those affidavits are not merely conclusory.[20] That is precisely what DHLP

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[19] The D.C. Circuit does not seem to have addressed a situation like the present case. In *United States* v. *Judicial Watch, Inc.*, 371 F.3d 824, 830 (2004), the D.C. Circuit held that a taxpayer was not entitled to cross-examine IRS agents who had issued a summons when the district court had already required the IRS to produce "all documents relating to its motivation and purpose" in issuing a summons and had reviewed those documents—more than 1000 pages in total—*in camera*. *See id.* at 831. Based on the court's citation to *United States* v. *Fensterwald*, 553 F.2d 231, 231-232 (D.C. Cir. 1977), however, it appears the D.C. Circuit endorsed the proposition that a taxpayer who makes credible allegations of IRS bad faith is entitled to gather some evidence from the IRS regarding the motivation of the agent issuing a summons. 371 F.3d at 831.

[20] *See, e.g.*, *Millman*, 765 F.2d at 29 (2d Cir.) (remanding for evidentiary hearing based on taxpayer allegations of bad faith: "Although mere conclusory allegations of wrongdoing unsupported by any evidence from which a court might draw an inference of abuse are insufficient to rebut the government's prima facie showing of a proper investigatory purpose, the taxpayer has met his burden if he alleges specific facts 'from which a court *might infer a possibility* of some wrongful conduct by the Government.'"); *Hintze* v. *IRS*, 879 F.2d 121, 126 (4th Cir. 1989) (taxpayer is entitled to an evidentiary hearing upon producing "some substantive

has done.[21] Accordingly, even if there were significance to the distinction some circuits have drawn between allegations supported by affidavit as opposed to those raised in a pleading, DHLP would nonetheless be entitled to an evidentiary hearing.

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evidence" corroborating his claim, in the form of "specific facts ... supported by affidavits, from which the court can infer a possibility of some wrongful conduct" (quoting *Kis*, 658 F.2d at 539)), *overruled on other grounds, Church of Scientology of California* v. *United States*, 506 U.S. 9, 15-17 (1992); *United States* v. *Balanced Fin. Mgmt., Inc.*, 769 F.2d 1440, 1445-1446 (10th Cir. 1985) ("[I]t is clear that a taxpayer must factually oppose the Government's allegations by affidavit. Legal conclusions or mere memoranda of law will not suffice" (quoting *Garden State Nat'l Bank*, 607 F.2d at 71)); *United States* v. *National Bank of S.D.*, 622 F.2d 365, 367 (8th Cir. 1980) ("An evidentiary hearing is necessary only where substantial deficiencies in the summons proceedings are raised by the party challenging the summons. And when, as in the instant case, only conclusory allegations of impropriety are made, the district court does not abuse its discretion in refusing to hold an evidentiary hearing." (citations omitted)); *see also United States* v. *John G. Mutschler & Assocs., Inc.*, 734 F.2d 363, 367 (8th Cir. 1984) (reaffirming that, under *Powell*, "a court asked to enforce an IRS summons may 'inquire into the underlying reasons for the examination' in order to prevent an abuse of the judicial process," in a case where an IRS official testified at an adversary hearing).

[21] Respondents did not rest on conclusory allegations of bad faith alone, but rather submitted declarations supporting their defenses to the extent possible given the limited information available to them. Thus, for example, respondent Clarke submitted a declaration stating: "DHLP refused to grant another extension [of the statute of limitations] and, immediately thereafter, despite having not asked for additional information for some time, the Government suddenly issued the instant summons." DE 8-1 ¶ 9.

B. The Eleventh Circuit's Approach Is An Appropriate Means Of Implementing This Court's Decision In *Powell*

This Court's review is also unwarranted because the Eleventh Circuit's approach is fully consistent with this Court's precedents and appropriately allows taxpayers a meaningful opportunity to prove the truth of their allegations of bad faith, as *Powell* requires.

In *Powell*, this Court confirmed that enforcement of a summons should be denied where the summons was issued "to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." 379 U.S. at 58; *see also Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964) (noting that a summons may be challenged on "any appropriate ground"); *United States* v. *Bisceglia*, 420 U.S. 141 (1975) (summons "must be scrutinized by a court to determine whether it seeks information relevant to a legitimate investigative purpose"). Moreover, *Powell* made clear that the taxpayer is entitled to establish the government's lack of good faith at an "adversary hearing." 379 U.S. at 58; *see also Reisman*, 375 U.S. at 446 (noting that an enforcement proceeding under Section 7402(b) is "an adversary proceeding affording a judicial determination of the challenges to the summons"); *Donaldson* v. *United States*, 400 U.S. 517, 527 (1971) (referring to "the adversary hearing to which the taxpayer is entitled before enforcement is ordered").

Powell thus makes clear that taxpayers must have a meaningful opportunity to establish that IRS summonses, though *presumptively* valid, nonetheless

should not be enforced.[22] Under *Powell*'s burden-shifting framework, the taxpayer bears the burden of raising a substantial question as to the government's good faith, but often the critical information needed to prove bad faith will be in the possession of the government. *See United States* v. *Security Bank & Trust Co.*, 661 F.2d 847, 850 (10th Cir. 1981) ("To flesh out [certain] defenses, the taxpayer must rely on information peculiarly within the knowledge or files of the Service."). If the taxpayer were denied all forms of discovery, the right recognized in *Powell* might well be rendered meaningless. *See Southeast First Nat'l Bank*, 655 F.2d at 667 (noting the potential for "an unreasonable circular burden on the taxpayer: the facts that he must show to obtain discovery are only available through discovery."); *United States* v. *Stuckey*, 646 F.2d 1369, 1373-1374 (9th Cir. 1981) ("We recognize the anomaly of placing a burden of proof upon the taxpayer and then denying access to what may be the very information needed to meet that burden."); *Kis*, 658 F.2d at 540 ("we do not want to put the taxpayer in the anomalous position of having to allege specific facts when he has no means to gather that information through discovery").

Here, for example, respondents made several specific allegations of bad faith that, if proven, would establish that the summonses should be quashed. Yet proof of these allegations is likely to require evidence in

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[22] The government emphasizes the "presumption of regularity" that inheres in governmental actions (Pet. 20), but neither *Powell* nor the Eleventh Circuit's rule is inconsistent with that presumption. Rather, those decisions provide a meaningful mechanism by which the taxpayer can rebut the presumption. The presumption of regularity of which the government speaks is not a *conclusive* presumption that can never be refuted.

the possession of the IRS. For example, respondents pleaded that the summonses were improperly issued in retaliation for DHLP's refusal to extend a statute of limitations. Proving that allegation will require respondent to develop evidence, either direct or circumstantial, about the agency's purpose in issuing the summonses. It would be unreasonable to expect respondents to carry a burden of producing evidence of retaliatory purpose without the opportunity to question the IRS official responsible for issuing the summons.

For circumstances like these, where specific, plausible allegations of bad faith have been made, the appropriate approach—as the government itself recognized in *Salter* and *Church of Scientology*—is to provide the taxpayer with a limited evidentiary hearing. The taxpayer can use that hearing to obtain evidence of bad faith, but is not entitled to further discovery unless the evidentiary hearing yields evidence that justifies further inquiry. The hearing itself serves as a filtering mechanism to prevent intrusive discovery in cases where the taxpayer's objections lack substantiation. *See Salter*, 432 F.2d at 701 ("the hearing requirement will have the salutary effect of eliminating discovery in cases in which it is clear that respondent will not be able to prove his allegations").

This approach preserves the summary nature of enforcement proceedings, *see Donaldson*, 400 U.S. at 528-529, but ensures that the taxpayer has a meaningful opportunity to carry his burden under *Powell*. And, as the courts of appeals have recognized, a more restrictive rule would place the taxpayer in a "Catch-22": it would require rejection of a taxpayer's request for a hearing because the taxpayer had not adduced sufficient evidence, even though the hearing was precisely what the taxpayer needed to develop its evidence. *See*

Nero, 570 F.3d at 1250; *Southeast First Nat'l Bank*, 655 F.2d at 667 ("[W]e simply refuse to create a rule that would require [a] taxpayer to allege a factual background before he is entitled to the initial, basic discovery provided by an adversary hearing."); *see also Federal Election Comm'n* v. *Committee to Elect Lyndon La Rouche*, 613 F.2d 849, 862 (D.C. Cir. 1979) ("[S]everal courts have held that, where a summonee raises colorable allegations of an improper purpose and seeks to prove those allegations, the enforcement court must afford the summonee at least some opportunity to substantiate its allegations. To rule otherwise ... would render it virtually impossible for a summonee to prove that a facially valid summons was, in fact, issued for an improper purpose." (citations omitted)).

The Eleventh Circuit's measured approach appropriately allows the taxpayer to have a meaningful opportunity to develop its allegations of bad faith while ensuring that enforcement proceedings remain streamlined. Absent any actual showing by the government that this approach threatens the effective enforcement of the tax laws, this Court's intervention is not warranted.

C. This Case Is A Poor Vehicle For Review Because Respondents Adduced Substantial Evidence That The Government Improperly Issued The Summonses To Circumvent Tax Court Discovery Rules

Finally, review should be denied because, in addition to alleging that the IRS had improperly issued the summonses in retaliation for DHLP's refusal to extend the statute of limitations (which the Eleventh Circuit found sufficient to warrant a hearing), respondents also brought forward compelling, and as yet unrebutted, evidence that the IRS was not seeking to enforce the

summonses for a proper *investigative* purpose, but rather was using them for its advantage in the Tax Court litigation and in circumvention of Tax Court discovery rules. The Eleventh Circuit did not reach that issue,[23] but there can be no serious dispute that if such government tactics are recognized, as they should be, as an abuse of process, then DHLP has produced more than adequate evidence to warrant an evidentiary hearing in any circuit. *See supra* A.4.

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[23] The government argued below and the district court held that circumvention of Tax Court discovery rules would not constitute an abuse of the summons process. *See* Pet. 14 n.2; Pet. App. 19a. Although two circuits have adopted the government's position, that issue remains open in the Eleventh Circuit. *Cf. Nero*, 570 F.3d at 1250 n.4 (refusing to "narrowly circumscribe[]" the definition of "improper motive"). The Eleventh Circuit might well conclude that the IRS should not be allowed to use its summons power to engage in fact discovery that would not be permitted under Tax Court rules after the IRS has issued an FPAA and the dispute has entered the litigation stage. *See generally* Hyman, *When Rules Collide: Procedural Intersection and the Rule of Law*, 71 Tulane L. Rev. 1389 (1997); *see also* Hyman, *Procedural Intersection and Special Pleading: Is Tax Different?*, 71 Tulane L. Rev. 1729, 1740 (1997) ("Preventing such circumvention is consistent with the overall logic of the system. The sweeping summons power is a creature of the audit examination, and must operate within the functional limits imposed by the statute of limitations. Issuance of a deficiency notice marks the end of the audit examination—and hence the termination of the summons power with regard to those years." (footnote omitted)); *see also Resolution Trust Corp.* v. *Thornton*, 41 F.3d 1539, 1545-1548 (D.C. Cir. 1994) (quashing RTC subpoena during pendency of litigation because the agency no longer had a valid investigatory purpose for the summons); *cf. In re: 2435 Plainfield Ave., Inc.*, 223 B.R. 440, 455-456 (Bankr. D.N.J. 1998) (compiling cases holding that the broad investigative powers available under Bankruptcy Rule 2004 cannot be used in adversary proceedings to circumvent the discovery limitations in the Federal Rules of Civil Procedure).

Respondent submitted affidavits and Tax Court pleadings showing that (1) the summonses were issued after the final version of the FPAA was signed; (2) when one of the six summoned individuals complied with the summons, she was interviewed by the IRS attorneys representing the government in the Tax Court case, and the IRS agent who actually issued the summons did not attend; (3) in the Tax Court case, the IRS refused to participate in standard court mediation on the grounds that the IRS is still awaiting the "discovery" sought through the summonses; (4) the IRS opposed a motion for a protective order in the Tax Court by reference to the outstanding summonses; and (5) the IRS sought a continuance in the Tax Court case on the grounds that the summonses were still outstanding. *See* DE 20-2 to 20-6 (Exs. B-E).

Respondents also submitted an excerpt from the IRS's own Summons Handbook suggesting that issuance and enforcement of these summons constituted an abuse of the summons process. Specifically, the Handbook states:

> In all but extraordinarily rare cases, the Service must not issue a summons after a Statutory Notice of Deficiency (SND) is mailed to the taxpayer to continue the investigation of the same taxable periods and liabilities covered by the SND. After an SND is mailed, the Service should no longer be in the process of gathering the data to support a determination because the SND represents the Service's presumptively correct determination and indicates the examination has been concluded.

DE at 20-7 (Ex. F) (Handbook § 25.5.4.4.8). Thus, the IRS itself seems to acknowledge it should no longer

have been in the process of gathering data to support its determination after a presumptively correct final determination (the FPAA) had already been issued.[24]

There is thus copious evidence that the IRS was improperly attempting to use investigative summonses to evade Tax Court rules. The government's disagreement with the Eleventh Circuit's ruling is, therefore, largely academic, and this case does not present a suitable occasion for the resolution of any divergence among the court of appeals' standards for an evidentiary hearing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2013

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[24] Here, the summonses were issued before the FPAA was mailed, but after the final version of the FPAA was signed. And the summonses were not enforced until months after the FPAA was issued.

REPLY BRIEF

Supreme Court, U.S.
FILED
DEC 20 2013
OFFICE OF THE CLERK

No. 13-301

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL CLARKE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The court below applied a bright-line rule under which the opponent of an Internal Revenue Service (IRS) investigatory summons is entitled to examine IRS agents regarding their subjective motives for issuing the summons whenever the opponent alleges agency bad faith. Respondents do not defend that holding. They instead recharacterize the court of appeals' decision as requiring district courts to allow such examinations only when an opponent makes a "substantial" showing of bad faith. *E.g.*, Br. in Opp. 10-11. But while that is the rule adopted by every other court of appeals with jurisdiction over IRS summons-enforcement actions, it is not the rule in the Eleventh Circuit. Review of that court's decision is warranted to resolve the intractable division among the courts of appeals and to correct the Eleventh Circuit's erroneous approach, which threatens to under-

mine the efficient enforcement of federal tax laws. In light of respondents' refusal to defend the proposition that a district court abuses its discretion by denying an examination request that is premised on a bare allegation of agency bad faith, summary reversal may be appropriate.

A. Respondents Do Not Defend The Court Of Appeals' Actual Holding

1. Respondents characterize the Eleventh Circuit as holding—first in *Nero Trading, LLC* v. *U.S. Department of Treasury*, 570 F.3d 1244, 1249 (2009), and then in this case—that a summons opponent is entitled to examine IRS agents about their motives for issuing a summons *only* when the opponent demonstrates a "substantial" basis for alleging bad faith by the IRS. See, *e.g.*, Br. in Opp. 10, 12, 14, 17, 18, 20, 21. The word "substantial," however, does not appear either in the decision below or in *Nero*. Instead, the Eleventh Circuit held that a district court abuses its discretion by denying an examination request whenever a taxpayer makes an "allegation of an improper purpose." Pet. App. 5a. Nothing in the court's opinion suggests that an allegation of bad faith must be "substantial," or supported by evidence already in the summons opponent's possession, in order to trigger an absolute right to examine IRS agents. On the contrary, the court of appeals specifically rejected such a limitation as unduly restrictive, stating that "in situations such as this, requiring the taxpayer to provide factual support for an allegation of an improper purpose, without giving the taxpayer a meaningful opportunity to obtain such facts, saddles the taxpayer with an unreasonable circular burden, creating an impermissible 'Catch 22.'" *Ibid.*

Respondents' gloss on the opinion below also ignores the court of appeals' separate holding that respondents were "not entitled to discovery" because "the full 'panoply of expensive and time-consuming pretrial discovery devices may not be resorted to as a matter of course and on a mere allegation of improper purpose.'" Pet. App. 5a n.3 (quoting *Nero*, 570 F.3d at 1249). That rationale for denying discovery would make no sense if the court believed that respondents had made a substantial threshold showing of agency bad faith. Read as a whole, the court's opinion unambiguously holds that, although a "mere allegation of improper purpose" does not entitle a summons opponent to broad discovery, it *does* entitle him to question IRS agents about their reasons for issuing the summons. See *id.* at 5a-6a & n.3.

Similarly in *Nero*, the Eleventh Circuit stated that "an allegation of improper purpose is sufficient to trigger a limited adversary hearing where the taxpayer may question IRS officials concerning the Service's reasons for issuing the summons." 570 F.3d at 1249 (quoting *United States* v. *Southeast First Nat'l Bank*, 655 F.2d 661, 667 (5th Cir. 1981)). As respondents observe (Br. in Opp. 12), the court in *Nero* also stated that "the scope of any adversarial hearing in this area is left to the discretion of the district court." 570 F.3d at 1249. The rest of the *Nero* opinion makes clear, however, that in determining the "scope" of an adversarial hearing in this context, district courts in the Eleventh Circuit may not deny a summons opponent's request to question IRS officials. The court in *Nero* recognized that its approach "is not in accord with that of a number of" other circuits that "requir[e] the taxpayer to develop facts sufficient to allow [a district]

court to draw [an] inference of wrongful conduct by [the] government" before a taxpayer is entitled to conduct such an examination. *Id.* at 1249-1250. The court in *Nero* "simply refuse[d] to create a rule that would require [a] taxpayer to allege a factual background" for a charge of bad faith "before he is entitled to" "question the Service concerning its reasons for issuing summonses." *Id.* at 1250.

2. Respondents do not defend the rule actually announced and applied by the court of appeals, which is inconsistent with the core premises on which the IRS's summons-enforcement practices are based. Congress has granted the IRS expansive summons authority, 26 U.S.C. 7602, and this Court has repeatedly held that the agency's authority is both broad and essential to effectuating our self-reporting system of federal taxation. See *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 815-817 (1984); *United States* v. *Euge*, 444 U.S. 707, 714-715 (1980); *United States* v. *Bisceglia*, 420 U.S. 141, 145-146 (1975); Pet. 9-13.

Once the government makes a prima facie showing that it issued a challenged summons in good faith, it is entitled to have the summons enforced unless the objector "develop[s] facts from which a court might *infer* a *possibility* of some wrongful conduct by the Government." *United States* v. *Kis*, 658 F.2d 526, 540 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982); see *United States* v. *Powell*, 379 U.S 48, 51, 56-68 (1964); see also Pet. 11-15. In any summons-enforcement proceeding, an objector is entitled to an adversary hearing at which it "may challenge the summons on any appropriate ground" by (for example) making legal arguments or presenting evidence already in the opponent's possession. *Powell*, 379 U.S. at 58. But

when a summons opponent seeks to probe IRS officials' subjective motivations for issuing the summons, based on a bare allegation of bad faith, a district court should have discretion to deny the objector's request.

B. The Decision Below Conflicts With Decisions Of Every Other Court Of Appeals With Jurisdiction Over IRS Summons-Enforcement Actions

Respondents contend (Br. in Opp. 15-23) that the decision below is consistent with the standard applied by all (or nearly all) other courts of appeals. That assertion is unfounded. Every other court of appeals with jurisdiction over summons-enforcement proceedings allows a district court, in its discretion, to deny a request for an opportunity to examine IRS officials when the request is based on a bare allegation of bad faith. See Pet. 15-19. Respondents' attempts to reconcile the Eleventh Circuit's holdings in this case and in *Nero* with the holdings of the eleven other courts of appeals to consider this question is premised on respondents' misreading of the decision below.

Respondents contend (Br. in Opp. 15-20) that the court below applied a substantiality standard that is the same, or approximately the same, as the standards applied in the Fifth, Sixth, and Ninth Circuits. As discussed, the Eleventh Circuit does not apply such a standard; the Eleventh Circuit's per se rule thus conflicts with the standard applied in those circuits, each of which requires more than a bare allegation of bad faith to guarantee an opportunity to question government officials. See *Mitchell* v. *Thomas*, 239 Fed. Appx. 56, 57 (5th Cir. 2007) (rejecting request for hearing to examine officials when request was based only on "conclusory assertions" and allegations with "no support * * * that the summons [at issue] was

issued in bad faith"); *Phillips* v. *United States*, No. 98-3128, 1999 WL 228585, at *4 (6th Cir. Mar. 10, 1999) (affirming district court's refusal to hold evidentiary hearing based on allegations of bad faith because challengers had not made "a considerable showing of abuse"); *Fortney* v. *United States*, 59 F.3d 117, 121 (9th Cir. 1995) (similar).

As respondents acknowledge, the Third and Seventh Circuits similarly do not require a district court to allow examination of IRS officials unless a summons objector has "provide[d] evidence of bad faith." Br. in Opp. 20. Respondents argue (*id.* at 20-21) that the difference between the standard applied in those courts and that in the Eleventh Circuit is insignificant because the Third and Seventh Circuits "require the government to provide certain forms of pre-hearing discovery that would give the taxpayer the materials necessary to meet this evidentiary hurdle." *Id.* at 21. Respondents are incorrect.

Before Congress enacted the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324 (see Pet. 12-13), the Third and Seventh Circuits required the government to provide factual information related specifically to whether a challenged summons was issued solely for an improper criminal-investigation purpose. *United States* v. *Garden State Nat'l Bank*, 607 F.2d 61, 71 (3d Cir. 1979); *Kis*, 658 F.2d at 540-541. District courts in the Third and Seventh Circuits have recognized, however, that this requirement was abrogated by TEFRA, which clarified the relationship between civil and criminal IRS investigations. See *Drum* v. *United States*, 570 F. Supp. 938, 941-942 (M.D. Pa. 1983), aff'd, 735 F.2d 1348 (3d Cir. 1984); *Godwin* v. *United*

States, 564 F. Supp. 1209, 1214 (D. Del. 1983); *United States* v. *Particle Data, Inc.*, 634 F. Supp. 272, 276-277 (N.D. Ill. 1986). And with respect to all allegations of bad faith (whether or not related to a potential ongoing criminal investigation), neither circuit has required district courts to permit questioning of IRS officials when such allegations are unsupported. See *Garden State Nat'l Bank*, 607 F.2d at 71; *Kis*, 658 F.2d at 539. For the same reason, the First Circuit's pre-TEFRA decision in *United States* v. *Salter*, 432 F.2d 697 (1970) (see Br. in Opp. 17-18), does not render insignificant the conflict between the First and Eleventh Circuits. See *Sugarloaf Funding, LLC* v. *U.S. Dep't of Treasury*, 584 F.3d 340, 351 (1st Cir. 2009) (holding that, in order to be entitled to examine IRS officials, a "taxpayer must do more than allege an improper purpose; he must introduce evidence to support his allegations"); see *Copp* v. *United States*, 968 F.2d 1435, 1438 n.1 (1st Cir. 1992) (same), cert. denied, 507 U.S. 910 (1993).[1]

Respondents appear to concede (Br. in Opp. 22-23 & nn.19-20) that the Eleventh Circuit's approach conflicts with the approach adopted by the Second,

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[1] Respondents read too much (Br. in Opp. 13-14, 26) into the government's pre-TEFRA position in *Salter* that examination of IRS officials was appropriate where the summons opponents had alleged that the summonses were issued solely for the purpose of criminal investigation. Under TEFRA, such allegations are now legally insignificant, and the First Circuit's current standard on the question presented in this case conflicts with the standard applied below. Respondents appear to be mistaken in contending (*id.* at 14, 26) that the government made the same argument in *United States* v. *Church of Scientology*, 520 F.2d 818 (9th Cir. 1975), where there was no allegation of an improper criminal-only purpose, see *id.* at 824-825.

Fourth, Eighth, and Tenth Circuits. That concession alone provides a sufficient basis to grant certiorari. Respondents suggest (*id.* at 23) that the conflict is not significant because they could have satisfied the more stringent rule applied outside the Eleventh Circuit. As explained at pp. 10-11, *infra*, that is not so. In any event, the Eleventh Circuit never considered that question because it applied a categorical rule that a district court must permit examination of IRS officials whenever a summons opponent alleges bad faith. That broad rule should be corrected.[2]

C. The Question Presented Is Recurring And Important

Respondents attempt to downplay (Br. in Opp. 12-13) the disruption the Eleventh Circuit's standard will cause to the IRS's efficient enforcement of the federal tax laws. They see "no reason" to think that the Eleventh Circuit's approach "should lead to any substantial delay in summons enforcement where the taxpayer's objections are not meritorious." *Id.* at 12. Respondents underestimate the practical significance of the Eleventh Circuit's deviation from usual summons-enforcement standards.

District courts already protect taxpayers against abusive summons practices by requiring the IRS to

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[2] As respondents explain (Br. in Opp. 22 n.19), the D.C. Circuit's decision in *United States* v. *Judicial Watch, Inc.*, 371 F.3d 824 (2004), arose in a different factual posture because the court there had examined IRS documents that shed light on the reasons for the summonses. See *id.* at 828. That court explained more generally, however, that "[i]f the taxpayer cannot develop even the evidence necessary to [suggest that an audit was improper], then an evidentiary hearing would be a waste of judicial time and resources." *Id.* at 831 (quoting *Kis*, 658 F.2d at 540) (second brackets in original).

establish that it issued a challenged summons in good faith and by allowing a taxpayer to present valid objections at an adversary hearing. District courts also have discretion (outside the Eleventh Circuit) to hold additional hearings for examination of IRS officials if there is reason to believe, notwithstanding the IRS's representation that it has satisfied the *Powell* factors, that a summons was issued for an improper purpose. The Eleventh Circuit has gone a step further by requiring district courts to permit such examinations whenever a summons objector alleges bad faith. The delay that will predictably flow from that requirement is not what Congress intended, and it is inconsistent with this Court's recognition that summons proceedings should be summary in nature. See *United States* v. *Stuart*, 489 U.S. 353, 369 (1989).[3]

Respondents are also wrong in suggesting (Br. in Opp. 1, 10) that the government's decision not to file a petition for a writ of certiorari in *Nero* indicates that the Eleventh Circuit's rule does not unduly burden the government's enforcement of IRS summonses. Slightly more than a month after the Eleventh Circuit denied the government's rehearing petition in *Nero*, the district court in that case enforced the summons without any examination of IRS officials after the objector failed to appear at a scheduled hearing. 1:07-

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[3] Respondents severely underestimate the extent of summons-enforcement litigation in the district courts within the Eleventh Circuit. Respondents identify (Br. in Opp. 13) an annual average of five *published* decisions on Westlaw involving enforcement of an IRS summons in such courts. Internal Department of Justice case-tracking data indicate, however, that the Department's Tax Division has litigated 93 summons cases in those district courts since 2009. That figure does not include the number of summons cases litigated by United States Attorney Offices in those districts.

CV-1816, Docket entry No. 51 (N.D. Ga. Nov. 12, 2009) (minute entry); *id.* Docket entry No. 52 (Nov. 16, 2009) (order); *id.* Docket entry No. 53, at 5-6 (Dec. 10, 2009) (transcript of Nov. 12, 2009 hearing). The district court's enforcement order in *Nero* rendered moot the government's objection to the broad rule applied by the court of appeals in that case.

D. This Case Is An Appropriate Vehicle For Reviewing The Question Presented

Respondents argue (Br. in Opp. 27-30) that this case is not an appropriate vehicle for resolving the question presented because they presented "compelling * * * evidence" that the IRS did not seek to enforce the summonses at issue for a proper investigatory purpose, *id.* at 27-28, and "some evidence" to "substantiat[e their] allegations of bad faith" with respect to the issuance of the summonses, *id.* at 22. That is incorrect. Even if respondents' factual allegations had been substantiated with probative evidence, respondents should not have been entitled to examine IRS officials because (as the district court held, see Pet. App. 18a-19a) their allegations of abuse would have failed as a matter of law. See Gov't C.A. Br. 23-48; see also *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 324 n.7 (1985) (noting that no evidentiary hearing is required when an allegation of improper purpose, "[e]ven if factually true, * * * did not provide a basis for quashing the summonses"). The proper resolution of that question, however, is ultimately irrelevant to the certworthiness of this case. If this Court grants review and corrects the court of appeals' erroneous legal rule, respondents will remain free on remand to argue the merits of their objections to the summonses under the appropriate standard.

Respondents' contention that the Court should forgo review is unsound for an additional reason. Because the court of appeals' erroneous rule requires a district court to allow examination of IRS agents whenever a summons opponent alleges bad faith, the question whether such examination is required is very unlikely to come before the Eleventh Circuit again. When a district court grants a motion for examination—as all district courts in the Eleventh Circuit will be required to do in these circumstances going forward—the court of appeals will have no occasion to consider whether it would have been an abuse of discretion to deny such a request.

That question reached the court of appeals in this case because the district court construed *Nero* not to require examination of IRS officials based on a bare allegation of bad faith. See Pet. App. 17a. The Eleventh Circuit eliminated any uncertainty about the import of *Nero*, however, by clarifying that respondents were entitled to conduct such an examination *without* "provid[ing] factual support for [their] allegation of an improper purpose." *Id.* at 5a; see *id.* at 6a. Thus, although district courts throughout the country will continue to receive examination requests in summons proceedings, this Court is unlikely to have a future opportunity to correct the Eleventh Circuit's erroneous rule. Review is therefore warranted in this case.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted. In the alternative, the judgment of the court of appeals should be summarily reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

DECEMBER 2013

JOINT APPENDIX

Supreme Court, U.S.
FILED
FEB 14 2014
OFFICE OF THE CLERK

No. 13-301

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL CLARKE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: SEPT. 6, 2013
CERTIORARI GRANTED: JAN. 10, 2014

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Docket No. 9:11-mc-80456-KLR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF BEEKMAN VISTA, DYNAMO HOLDINGS LIMITED PARTNERSHIP, DEFENDANTS-APPELLANTS

Docket No. 9:11-mc-80457-KLR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DYNAMO HOLDINGS LIMITED PARTNERSHIP, INTERVENOR PLAINTIFF-APPELLANT

MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF DYNAMO GP, INC., AS GENERAL PARTNER OF DYNAMO HOLDINGS LIMITED PARTNERSHIP, DEFENDANT-APPELLANT

Docket No. 9:11-mc-80459-KLR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DYNAMO HOLDINGS LIMITED PARTNERSHIP, INTERVENOR PLAINTIFF-APPELLANT

RITA HOLLOWAY, AS TRUSTEE FOR THE 2005 CHRISTINE MOOG FAMILY DELAWARE DYNASTY TRUST, DEFENDANT

Docket No. 9:11-mc-80460-KLR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MARC JULIEN, AS TRUSTEE FOR THE 2005 ROBERT JULIEN DELAWARE DYNASTY TRUST, DEFENDANT

DYNAMO HOLDINGS LIMITED PARTNERSHIP, INTERVENOR DEFENDANT-APPELLANT

Docket No. 9:11-mc-80461-KLR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ROBERT JULIEN, DEFENDANT-APPELLANT

DYNAMO HOLDINGS LIMITED PARTNERSHIP, INTERVENOR DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	PROCEEDINGS
6/15/12	CIVIL APPEAL DOCKETED. Notice of appeal filed by Appellant Michael Clarke on 06/12/2012. Fee Status: Fee Paid. Appellant brief due 40 days from 06/15/2012.

DATE	PROCEEDINGS
	* * * * *
8/23/12	Appellants' Brief filed by Michael Clarke, Dynamo Holdings Limited Partnership and Robert Julien. Service date: 08/22/2012 [12-13190] Attorney for Appellee: Farrior US mail; Attorney for Appellee: Welsh – US mail; Attorney for Not Party: Neiman US mail.
	* * * * *
11/5/12	Appellee's Brief filed by Appellee USA. Service date: 11/05/2012 email Attorney for Appellant: Marod; Attorney for Appellees: Schultz, Snyder; US mail Attorney for Appellant: Schwinghammer; Attorney for Appellees: Farrior, Ferrer, Welsh. (ECF: Deborah Snyder)
	* * * * *
11/30/12	Reply Brief filed by Appellants Michael Clarke, Dynamo Holdings Limited Partnership and Robert Julien. Service date: 11/30/2012 email Attorney for Appellees: Metzler, Snyder; US mail - Attorney for Not Party: Neiman. (ECF: Edward Marod)
	* * * * *

DATE	PROCEEDINGS
3/22/13	Oral argument held. Oral Argument participants were Edward A. Marod for Appellants Michael Clarke, Dynamo Holdings Limited Partnership and Robert Julien and Robert William Metzler for Appellee USA.
4/18/13	Judgment entered as to Appellants Michael Clarke, Dynamo Holdings Limited Partnership and Robert Julien.
4/18/13	Opinion issued by court as to Appellants Michael Clarke, Dynamo Holdings Limited Partnership and Robert Julien. Decision: Vacated and Remanded. Opinion type: Non-Published. Opinion method: Per Curiam.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
(West Palm Beach)

Civil Docket for Case No. 9:11-mc-80456-KLR

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF BEEKMAN VISTA, INC. DEFENDANT

DYNAMO HOLDINGS LIMITED PARTNERSHIP, RESPONDENT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
4/28/11	1	PETITION (Complaint) to Enforce IRS Summons RE: Government Agency. Filing fee $ 39.00. USA Filer No Filing Fee Required, filed by United States. (Attachments: # 1 Civil Cover Sheet, # 2 Affidavit, # 3 Exhibit, # 4 Text of

DATE	DOCKET NUMBER	PROCEEDINGS
		Proposed Order) (Welsh, Robert) (Entered: 04/28/2011)
		* * * * *
6/14/11	4	ORDER Requiring Response. Signed by Senior Judge Kenneth L. Ryskamp on 6/14/11. (mg) (Entered: 06/15/2011)
		* * * * *
7/18/11	7	ANSWER to Petition to Enforce IRS Summons by Michael Clarke. (Attachments: # 1 Exhibit Exhibit 1 Tax Court Petition, # 2 Exhibit Exhibit 1.A. FPAA)(Marod, Edward) (Entered: 07/18/2011)
7/18/11	8	NOTICE by Michael Clarke re 7 Answer to Petition to Enforce IRS Summons *of Filing Declaration in Support* (Attachments: # 1 Affidavit Declaration in Support of Response) (Marod, Edward) (Entered: 07/18/2011)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
7/29/11	10	RESPONSE/REPLY to 7 Answer to Petition to Enforce IRS Summons by United States of America. (See image DE 9) (mg) (Entered: 08/01/2011)
	* * * * *	
8/1/11	12	MOTION to Take Judicial Notice of Tax Court Discovery Rules by Michael Clarke. (Attachments: # 1 Exhibit Tax Court Discovery Rules 1, # 2 Exhibit Tax Court Discovery Rules 2, # 3 Exhibit Tax Court Discovery Rules 3, # 4 Exhibit Tax Court Discovery Rules 4) (Marod, Edward) (Entered: 08/01/2011)
8/9/11	13	Agreed MOTION to Intervene by Dynamo Holdings Limited Partnership. (Attachments: # 1 Exhibit Proposed Response of Intervenor) (Marod, Edward) (Entered: 08/09/2011)
8/16/11	14	ORDER granting 12 Motion for Judical Notice of the Discovery Rules of the United States Tax

DATE	DOCKET NUMBER	PROCEEDINGS
		Court. Signed by Senior Judge Kenneth L. Ryskamp on 5/16/11. (mg) (Entered: 08/17/2011)
8/30/11	15	ORDER granting 13 Motion to Intervene. Dynamo Holdings Limited Partnership's response to the petition must be filed separately. Signed by Senior Judge Kenneth L. Ryskamp on 8/30/11. (mg) (Entered: 08/30/2011)
9/6/11	16	*Intervenor DHLP's* ANSWER to Petition to Enforce IRS Summons *Adopting Response of Respondent* by Dynamo Holdings Limited Partnership. (Marod, Edward) (Entered: 09/06/2011)
9/8/11	17	Agreed MOTION to Consolidate Cases *11-mc-80456, -80457, -80459, -80460, and -80461* by Dynamo Holdings Limited Partnership. Responses due by 9/26/2011 (Attachments: # 1 Text of Proposed Order Pro-

DATE	DOCKET NUMBER	PROCEEDINGS
		posed order) (Marod, Edward) (Entered: 09/08/2011)
9/16/11	18	ORDER granting 17 Motion to Consolidate Cases. The parties shall file all motions and other papers including discovery related filings in this cas only. Signed by Senior Judge Kenneth L. Ryskamp on 9/14/2011. (mg) (Entered: 09/16/2011)
		* * * * *
10/19/11	20	MOTION for Summary Dismissal, MOTION for Hearing/Scheduling of Pretrial Conference by Michael Clarke, Dynamo Holdings Limited Partnership, Robert Julien, Michael Clarke. (Attachments: # 1 Exhibit A IRS Tax Court Discovery, # 2 Exhibit B - Affidavit of Richard Sapinski, Esq., # 3 Exhibit C IRS Refusal of Appellate Conference in Tax Court, # 4 Exhibit D – IRS Objection to Protective Order

DATE	DOCKET NUMBER	PROCEEDINGS
		in Tax Court, # 5 Exhibit D.1 Exhibits to Objection to Protective Order in Tax Court, # 6 Exhibit E IRS Motion for Continuance in Tax Court, # 7 Exhibit F - IRS Summons Handbook, # 8 Exhibit G - Letter to counsel for petitioner, # 9 Exhibit H - Response letter of counsel for petitioner) Associated Cases: 9:11-mc-80456-KLR, 9:11-mc-80457-KLR, 9:11-mc-80459-KLR, 9:11-mc-80460-KLR, 9:11-mc-80461-KLR (Marod, Edward) Modified Relief/Text on 10/20/2011 (ls). (Entered: 10/19/2011)
11/7/11	21	RESPONSE in Opposition re (18 in 9:11-mc-80460-KLR, 18 in 9:11-mc-80460-KLR, 20 in 9:11-mc-80456-KLR, 20 in 9:11-mc-80456-KLR, 16 in 9:11-mc-80459-KLR, 16 in 9:11-mc-80459-KLR, 24 in 9:11-mc-80457-KLR, 24 in 9:11-mc-80457-KLR, 19 in 9:11-mc-80461-KLR, 19 in 9:11-mc-

DATE	DOCKET NUMBER	PROCEEDINGS
		80461-KLR) MOTION for Sanctions *for Failure to Cooperate in Discovery Essential to Resolution of Case* MOTION *for Hearing in the alternative to Narrow Issues, Obtain Admissions, Control Discovery purusant to Rule 16* filed by United States of America. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2) Associated Cases: 9:11-mc-80456-KLR, 9:11-mc-80457-KLR, 9:11-mc-80459-KLR, 9:11-mc-80460-KLR, 9:11-mc-80461-KLR (Welsh, Robert) (Entered: 11/07/2011)
11/17/11	22	REPLY to Response to Motion re (18 in 9:11-mc-80460-KLR, 18 in 9:11-mc-80460-KLR, 20 in 9:11-mc-80456-KLR, 20 in 9:11-mc-80456-KLR, 16 in 9:11-mc-80459-KLR, 16 in 9:11-mc-80459-KLR, 24 in 9:11-mc-80457-KLR, 24 in 9:11-mc-80457-KLR, 19 in 9:11-mc-80461-KLR, 19 in 9:11-mc-80461-KLR) MOTION for

DATE	DOCKET NUMBER	PROCEEDINGS
		Sanctions *for Failure to Cooperate in Discovery Essential to Resolution of Case* MOTION *for Hearing in the alternative to Narrow Issues, Obtain Admissions, Control Discovery purusant to Rule 16* filed by Michael Clarke, Dynamo Holdings Limited Partnership, Robert Julien, Michael Clarke. Associated Cases: 9:11-mc-80456-KLR, 9:11-mc-80457-KLR, 9:11-mc-80459-KLR, 9:11-mc-80460-KLR, 9:11-mc-80461-KLR (Marod, Edward) (Entered: 11/17/2011)
		* * * * *
4/16/12	24	ORDER granting 1 Petition to Enforce Internal Revenue Summons; denying 20 Motion for Sanctions; denying 20 Motion for Hearing. This case is closed an all pending motions are denied as moot. Signed by Senior Judge Kenneth L. Ryskamp on 4/16/12. (tp) (Entered: 04/17/2012)

DATE	DOCKET NUMBER	PROCEEDINGS
5/17/12	25	MOTION to Stay re (24 in 9:11-mc-80461- KLR, 24 in 9:11-mc-80461-KLR) Order on Motion to Dismiss, Order on Motion for Hearing,, *Pending Appeal* by Michael Clarke, Dynamo Holdings Limited Partnership, Marc Julien, Robert Julien, Michael Clarke. Responses due by 6/4/2012 Associated Cases: 9:11-mc-80456-KLR, 9:11-mc-80457-KLR, 9:11-mc-80460-KLR, 9:11-mc-80461-KLR (Marod, Edward) Modified on 11/14/2012 to reflect motion pending, per chambers. (jmd) (Entered: 05/17/2012)
5/30/12	26	RESPONSE in Opposition re (30 in 9:11- mc-80457-KLR, 25 in 9:11-mc-80461-KLR, 23 in 9:11-mc-80460-KLR, 25 in 9:11-mc- 80456-KLR) MOTION to Stay re (24 in 9:11-mc-80461-KLR, 24 in 9:11-mc-80461-KLR) Order on Motion to Dismiss, Order on Motion for

DATE	DOCKET NUMBER	PROCEEDINGS
		Hearing,, *Pending Appeal* filed by United States of America. (Attachments: # 1 Exhibit) Associated Cases: 9:11-mc-80456-KLR, 9:11-mc-80457-KLR, 9:11-mc-80460-KLR, 9:11-mc-80461-KLR (Welsh, Robert) (Entered: 05/30/2012)
6/11/12	27	REPLY to Response to Motion re (30 in 9:11-mc-80457-KLR, 25 in 9:11-mc-80461- KLR, 23 in 9:11-mc-80460-KLR, 25 in 9:11-mc-80456-KLR) MOTION to Stay re (24 in 9:11-mc-80461-KLR, 24 in 9:11-mc-80461-KLR) Order on Motion to Dismiss, Order on Motion for Hearing, *Pending Appeal to the Eleventh Circuit* filed by Michael Clarke, Dynamo Holdings Limited Partnership, Marc Julien, Robert Julien, Michael Clarke. Associated Cases: 9:11-mc-80456-KLR, 9:11-mc-80457-KLR, 9:11-mc-80460-KLR, 9:11-mc-80461-KLR

DATE	DOCKET NUMBER	PROCEEDINGS
		(Marod, Edward) (Entered: 06/11/2012)
6/11/12	28	Notice of Appeal by Michael Clarke, as Chief Financial Officer of Beekman Vista, Inc., Michael Clarke, as Chief Financial Officer of Dynamo Holdings, Inc., and Robert Julien, together with Intervenor, Dynamo Holdings Limited Partnership; re (24 in 9:11-mc-80456-KLR) Order on Motion for Sanctions, Order on Motion for Hearing, (20 in 9:11-mc-80459-KLR) Order Dismissing Case, (24 in 9:11-mc-80461-KLR) Order on Motion to Dismiss, Order on Motion for Hearing, (22 in 9:11-mc- 80460-KLR) Order, Terminate Motions, (29 in 9:11-mc-80457-KLR) Order on Motion to Dismiss, Order on Motion for Hearing. Filing fee $455.00 Receipt #: FLS900001683. Within fourteen days of the filing date of a Notice of Appeal,

DATE	DOCKET NUMBER	PROCEEDINGS
		the appellant must complete the Eleventh Circuit Transcript Order Form regardless of whether transcripts are being ordered [Pursuant to FRAP 10(b)]. For information go to our FLSD website under Transcript Information. (mc) (Entered: 06/12/2012)
		* * * * *
2/5/13	41	ORDER granting 25 Motion to Stay the Enforcement of the April 16, 2012 Order Granting Petition to Enforce Internal Revenue Summons; Staying the enforcement of the tax summons pending appellate review thereof. Signed by Senior Judge Kenneth L. Ryskamp on 2/1/2013. (ls) (Entered: 02/05/2013)
4/29/13	42	ORDER REFERRING CASE to Magistrate Judge James M. Hopkins for Hearing and Report and Recommendation on the Issue of whether the IRS

DATE	DOCKET NUMBER	PROCEEDINGS
		issued several Tax Summonses for Proper or Improper Purposes. Magistrate Judge Ann E. Vitunac no longer assigned as presider/referral judge(s) in case. Signed by Senior Judge Kenneth L. Ryskamp on 4/25/2013. Associated Cases: 9:11-mc-80456-KLR, 9:11-mc-80457-KLR, 9:11-mc-80460-KLR, 9:11- mc-80461-KLR (ls) (Entered: 04/29/2013)
		* * * * *
6/14/13	44	NOTICE OF SETTING LIMITED ADVERSARIAL HEARING ON PETITION TO ENFORCE IRS SUMMONS (DE 1) (Adversarial Hearing set for 7/16/2013 01:00 PM in West Palm Beach Division before Magistrate Judge James M. Hopkins.) Signed by Magistrate Judge James M. Hopkins on 6/14/2013. Associated Cases: 9:11-mc-80456-KLR, 9:11-mc-80457-KLR, 9:11-mc-80460-KLR, 9:11-mc- 80461-

DATE	DOCKET NUMBER	PROCEEDINGS
		KLR (tmn) (Entered: 06/14/2013)

* * * * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Civil Action No. 9:11-mc-80456-KLR

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF BEEKMAN VISTA, INC., RESPONDENT

Filed: Apr. 28, 2011

PETITION TO ENFORCE INTERNAL REVENUE SERVICE SUMMONS

The United States of America, by and through its undersigned counsel, hereby petitions this Court for an order enforcing an Internal Revenue Service ("IRS") summons served on Michael Clarke, as Chief Financial Officer of Beekman Vista, Inc. ("Respondent"). In support, the United States avers as follows:

1. Jurisdiction over this matter is conferred upon this Court pursuant to 26 U.S.C. §§ 7402(b) and 7604(a) and 28 U.S.C. §§ 1340 and 1345.

2. Venue over this matter is proper in the Southern District of Florida, as Respondent resides in or may be found within the boundaries of this district.

3. Mary Fierfelder is a duly commissioned IRS Revenue Agent who is authorized to issue IRS administrative summonses pursuant to 26 U.S.C. § 7602, 26 C.F.R. § 301.7602-1, 26 C.F.R. § 301.7602-1T, and Internal Revenue Service Delegation Order No. 4 (as revised). (*See* Declaration of Revenue Agent Mary Fierfelder ("Fierfelder Decl.") ¶ 1) (attached as Exhibit 1).

4. Revenue Agent Fierfelder and the IRS have examined the tax returns of Dynamo Holdings Limited Partnership ("DHLP") for the years that ended December 31, 2005, December 31, 2006 and December 31, 2007. During the DHLP exam, issue arose with respect to debt that DHLP reported on its returns, including DHLP's questionable interest expenses in the amount of $17,000,000 in both 2006 and 2007. The summons seeks testimony and records Respondent may have regarding the tax reporting obligations of DHLP and deductions it has claimed. (Fierfelder Decl. ¶¶ 2-3.)

5. Pursuant to the above-described investigation, on September 24, 2010, Revenue Agent Fierfelder issued an administrative summons (Form 2039) directing Michael Clarke, as Chief Financial Officer of Beekman Vista, Inc. to appear on October 25, 2010, to produce for examination books, papers, records, and other information as described in the summons, and to give testimony relating to the investigation. (*Id.* ¶ 3.)

6. Revenue Agent Fierfelder served the summons on the Respondent in accordance with 26 U.S.C. § 7603 by handing a copy of the summons to him on September 28, 2010. (*Id.* ¶ 4.)

7. On September 28, 2010, Revenue Agent Fierfelder served the notice required by 26 U.S.C. § 7609(a) on the persons entitled to notice per Exhibit B of the summons, by sending it by certified mail, as evidenced in the certificate of service on the reverse side of the summons. (*Id.* ¶ 5.)

8. On October 25, 2010, Respondent did not appear and to date, Respondent has not produced any material or provided any testimony the summons seeks. (*Id.* ¶ 6).

9. To obtain enforcement of this summonses, Petitioner must establish that the summons: (1) is issued for a legitimate purpose; (2) seeks information relevant to that purpose; (3) seeks information that is not already within the IRS's possession; and, (4) satisfies all administrative steps required by the Internal Revenue Code. *United States v. Powell*, 379 U.S. 48, 57-58 (1964). The government "may satisfy its minimal burden by presenting the sworn affidavit of the agent who issued the summons attesting to these facts." *United States v. Morse*, 532 F.3d 1130, 1132 (11th Cir. 2008) (citation omitted).

10. Here, the attached Declaration of Revenue Agent Fierfelder establishes the government's *prima*

facie showing under *Powell* for enforcement of the IRS summons. (*See* Ex. 1).

11. The testimony and documents described in the summons may be relevant to determine the correctness of the federal tax reporting by Dynamo Holdings Limited Partnership for the taxable years ended December 31, 2005, December 31, 2006 and December 31, 2007, described above and in Revenue Agent Fierfelder's Declaration. (*Id.* ¶ 7.)

12. The documents sought are not already in the IRS's possession. (*Id.* ¶ 8.)

13. The summons was not issued for any improper purpose, and all administrative steps required by the Internal Revenue Code for the issuance of these summonses have been followed. (*Id.* ¶¶ 9-10.)

14. No Justice Department referral is in effect within the meaning of 26 U.S.C. § 7602(d)(2) regarding Dynamo Holdings Limited Partnership for the tax periods covered by the summons. (*Id.* ¶ 11.)

WHEREFORE, Petitioner, the United States of America, respectfully prays as follows:

A. That this Court enter an order directing Respondent to show cause in writing why he should not be ordered to comply with and obey the summons and each of its requirements;

B. That this Court enter an order directing Respondent to fully obey the summons and each of its

requirements by ordering the attendance, testimony, and production required and called for by the terms of the summons, before Revenue Agent Fierfelder, or any other proper officer or employee of the IRS, at such time and place as may be set by Revenue Agent Fierfelder, or any other proper officer or employee of the IRS;

C. That the United States recover its costs incurred in maintaining this action; and

D. That this Court grant such other and further relief as it deems is just and proper.

Respectfully submitted this 28th day of Apr. 2011.

JOHN A. DiCICCO
Principal Deputy Assistant
Attorney General, Tax Division

/s/ ROBERT L. WELSH
ROBERT L. WELSH
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 14198
Washington, D.C. 20044
Telephone: (202) 514-6068
Email: Robert.L.Welsh@USDOJ.GOV

Of Counsel,
WIFREDO A. FERRER, Esquire
United States Attorney
Southern District of Florida

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Civil Action No. 9:11-mc-80456-KLR

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF BEEKMAN VISTA, INC., RESPONDENT

DECLARATION OF MARY FIERFELDER, REVENUE AGENT, INTERNAL REVENUE SERVICE

I, Mary Fierfelder, pursuant to 28 U.S.C. § 1746, declare and state:

1. I am a duly commissioned Revenue Agent with the Internal Revenue Service ("IRS"). As a Revenue Agent, one of my responsibilities is to conduct tax investigations. To aid in those investigations, I am authorized to issue IRS summonses pursuant to 26 U.S.C. § 7602, 26 C.F.R. § 301.7602-1, 26 C.F.R. § 301.7602-IT, and Internal Revenue Service Delegation Order No. 4 (as revised). I have personal knowledge of the matters set forth in this Declaration.

2. The IRS has examined the tax returns of Dynamo Holdings Limited Partnership ("DHLP") filed for the years that ended December 31, 2005, December 31, 2006 and December 31, 2007. During the DHLP

exam, issues arose with respect to debt that DHLP reported on its returns, including DHLP's questionable interest expenses in the amount of $17,000,000 in both 2006 and 2007. A Final Partnership Administrative Adjustment was issued with respect to DHLP's above tax years on December 28, 2010. DHLP filed a petition for redetermination of its tax liability with the Tax Court challenging the FPAA on February 1, 2011.

3. On September 24, 2010, in furtherance of the above investigation and in accordance with 26 U.S.C. § 7602, I issued an administrative summons, Internal Revenue Service Form 2039 to Michael Clarke, as Chief Financial Officer of Beekman Vista, Inc., to give testimony and to produce for examination books, papers, records, or other data as described in said summons. The summons is attached to this Declaration as Exhibit A.

4. In accordance with 26 U.S.C. § 7603, on September 28, 2010, I served an attested copy of the Internal Revenue Service summons described in Paragraph (3) above on the respondent, Michael Clarke by handing a copy of the summons to him, as evidenced in the certificate of service on the reverse side of the summons.

5. On September 28, 2010, I served the notice required by 26 U.S.C. § 7609(a) on the persons entitled to notice per Exhibit B of the summons, by sending it by certified mail, as evidenced in the certificate of service on the reverse side of the summons.

6. On October 25, 2010, the respondent, Michael Clarke, did not appear in response to the summons. The respondent's refusal to comply with the summons continues to the date of this declaration.

7. Michael Clarke is Chief Financial Officer of Beekman Vista Inc. which is the counterparty to the DHLP transactions under investigation and so has information about and access to and control over records relevant to the tax reporting obligations of DHLP. It is necessary to obtain the testimony and to examine the books, papers, records, or other data sought by the summons in order to properly investigate the correctness of the federal tax reporting by Dynamo Holdings Limited Partnership for the taxable years ended December 31, 2005, December 31, 2006 and December 31, 2007.

8. The books, papers, records, or other data sought by the summons are not already in possession of the Internal Revenue Service except as follows:

1. With respect to item 2 of the summons, the Service is in possession of the following document:

No.	Date	Author(s)	Description	# of Pages
1	Unknown	Unknown	Beekman Vista, Inc. IDR #10 (The following partnerships are owned by the company as of 6/30/04, 6/30/05 and 6/30/06.	1

2. With respect to item 16 of the summons, the Service in possession of the following documents:

No.	Date	Author(s)	Description	# of Pages
1	July 30, 2010	Unknown	Business Purpose of Beekman Vista, Inc. Loan to Kolter Capital, LLC	4
2	May 2003	Thomas S. Axworthy	Unwilling to be Willing: The Primacy and Capability Principles in Canadian-American Relations	20
3	July 16, 2010	Canto & Crossen	Anti-Americanism: Letters to the Editor	9
4	Jan. 15, 2004	Joel Sokolsky	Realism Canadian Style: The Chretien Legacy in Foreign and Defense Policy and the Lessons for Canada-U.S. Relations	2

5	June 22, 2010	Richard Sanders	Canada's Covert War in Iraq	6
6	Apr. 25, 2006	Diane Francis at Harvard	Why Canada Did Not Join the Iraq Coalition	26
7	Apr. 25, 2009	James Laxer	McCain, Napolitano and the myth that the 9/11 terrorists entered the U.S. from Canada	3
8	Apr. 9, 2005	Doug Struck	Canada Fights Myth It Was 9/11 Conduit	2
9	April 22, 2009	JPT	Blame Canada?	3
10	Mar. 7, 2006	Unknown	Website Counters Anti-Canada Myths in U.S.	2
11	July 4, 2007	Peter Morici	Quotes of the Day	1
12	Dec. 20, 2005	Unknown	U.S. Senator revives 9/11 Myth about Canada	4
13	Sept. 15, 2009	Unknown	Canada Grows Up	2
14	Mar. 12, 2003	Sean Loughlin	House cafetarias change names for 'french' fries and 'french' toast	2

15	Aug. 6, 2007	Erica Alini	Liberal Perspective on Foreign Affairs, International Law and Canadian Politics	4
16	Nov. 28, 2004	Nora Jacobson	Before you Flee to Canada, Can We Talk?	3
17	June 7, 2004	Judi McLeod	Anti-Americanism spoon-fed to Canadian grade school kids	2
18	Jan. 20, 2003	Alexander Kizuk	Anti-Americanism in Canada	1
19	Mar. 7, 2003	Jamie Glazov	The Sickness of Canadian Anti-Americanism	3
20	Unknown	Barbara Amiel	Anti-American Attitudes	4
21	Unknown	Unknown	Anti-Americanism within Canada is utterly stupid	8
22	2000	Unknown	Molson Canadian Commercial	3
23	Aug. 29, 2006	Larry Zolf	Anti-Americanism and the Canadian Identity	8
24	Dec. 21, 2005	Stephen Brown	Canada's Hate-American Gambit	4

25	Nov. 21, 2007	Mike O'Hara	Is Canada "Anti-American"?	1
26	Apr. 1997	Theodore Plantinga	Anti-Americanism and Canadian Identity	5
27	May 22, 2003	Unknown	Canadian Anti-Americanism: Before and After 9/11	2
28	Feb. 27, 1916	Helen Cole	Our Share Of Abuse: Evidence of an Anti-American Sentiment in Canada	1
29	Jan. 11, 2006	Macreena Doyle	Anti-Americanism Is 'Good Politics' in Canada	1
30	July 1, 2006	Arnomann	Growing Anti-American attitude in Canada	8
31	Unknown	Jefferson Morley	Canada's Anti-American Impulse	70
32	Aug. 1, 2008	Unknown	Canadian Americanophobia Never Takes a Holiday	45
33	1999	Unknown	Welcome to the Kolter Era	3
34	2000	Unknown	Kolter: The Cornerstone of Quality	4

35	2002	Unknown	Welcome to the Kolter Era: The Waterclub Toronto	28
36	Unknown	Unknown	Houses Sold by Region: Annual Data	2
37	Aug. 23, 2006	Jessica Holzer	A Soft Landing for Housing	2
38	Unknown	Unknown	Dynamo LP 12/31/2006 Financial Results: Loan-to Value Ratio	1
39	Unknown	Unknown	FHFA USA Indexes (Purchase Only and All-Transactions)	1

3. With respect to item 27, the Service is in the possession of the following documents:

No.	Date	Author(s)	Description	# of Pages
1	Oct. 28, 2010	M. Clarke	The Grande at Mirasol, LLC Balance Sheet Summary as of December 31, 2005	1
2	Oct. 28, 2010	M. Clarke	The Grande at Mirasol, LLC Income Statement Summary as of December 31, 2005	1

3	Oct. 28, 2010	M. Clarke	The Grande at Mirasol, LLC Income Statement Summary as of December 31, 2006	1
4	Aug. 28, 2007	M. Clarke	The Grande at Mirasol, LLC GL Trial Balance 12/31/2006	2

4. With respect to item 28, the Service is in possession of the following documents:

No.	Date	Author(s)	Description	# of Pages
1	Oct. 28, 2010	M. Clarke	The Grande at Mirasol, LLC Balance Sheet Summary as of December 31, 2005	1
2	Oct. 28, 2010	M. Clarke	The Grande at Mirasol, LLC Income Statement	1

			Summary as of December 31, 2005	
3	Oct. 28, 2010	M. Clarke	The Grande at Mirasol, LLC Income Statement Summary as of December 31, 2006	1
4	Aug. 28, 2007	M. Clarke	The Grande at Mirasol, LLC GL Trial Balance 12/31/2006	2

5. With respect to items 33 and 34, the Service is in possession of the following document:

No.	Date	Author(s)	Description	# of Pages
1	Unknown	Unknown	Dynamo Investments L.P. Interest	1

			Expense Advance from Beekman Vista, Inc.	

9. The summons was not issued to harass or for any other improper purpose.

10. All administrative steps required by the Internal Revenue Code for the issuance of this summons has been followed.

11. A Justice Department referral, as defined by 26 U.S.C. § 7602(d)(2), is not in effect with respect to Dynamo Holdings Limited Partnership for the tax year under investigation.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed this [22] day of Apr., 2011.

/s/ MARY FIERFELDER
MARY FIERFELDER
Revenue Agent,
Internal Revenue Service

Summons

In the matter of Dynamo Holdings Limited Partnership

Internal Revenue Service (Division) LMSB

Industry/Area (name or number) Heavy Manufacturing and Transportation

Periods Calendar years ended December 31, 2005, December 31, 2006, and December 31, 2007

The Commissioner of Internal Revenue

To Michael Clarke, as Chief Financial Officer of Beckman Vista, Inc.

At 701 S. Olive Avenue, Apt. 104, West Palm Beach, Florida 33401

You are hereby summoned and required to appear before Mary Fierfelder, Internal Revenue Agent, Badge Number 65-03226 an officer of the Internal Revenue Service, to give testimony and to bring with you and to produce for examination the following books, records, papers, and other data relating to the tax liability or the collection of the tax liability or for the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws concerning the person identified above for the periods shown.

See Exhibit A

Do not write in this space

Government Exhibit A

Business address and telephone number of IRS officer before whom you are to appear:

1700 Palm Beach Lakes Boulevard, Suite 500, West Palm Beach, Florida 33401 561-616-2093

Place and time for appearance at 1700 Palm Beach Lakes Boulevard, Suite 500, West Palm Beach, Florida 33401

IRS

Department of the Treasury
Internal Revenue Service

www.irs.gov

Form 2039 (Rev. 12-2001)
Catalog Number 21405J

on the 25th day of October 2010 at 10:00 o'clock A.M.

Issued under authority of the Internal Revenue Code this 24th (seal) day of September 2010 (year)

Mary Fierfelder
Signature of issuing officer

Internal Revenue Agent
Title

Signature of approving officer (if applicable)

Team Manager
Title

Original — to be kept by IRS

Service of Summons, Notice and Recordkeeper Certificates

(Pursuant to section 7603, Internal Revenue Code)

I certify that I served the summons shown on the front of this form on:

Date	Time
September 28, 2010	11:00 a.m.

How Summons Was Served

1. [X] I certify that I handed a copy of the summons, which contained the attestation required by § 7603, to the person to whom it was directed.
2. [ ] I certify that I left a copy of the summons, which contained the attestation required by § 7603, at the last and usual place of abode of the person to whom it was directed. I left the copy with the following person (if any):
3. [ ] I certify that I sent a copy of the summons, which contained the attestation required by § 7603, by certified or registered mail to the last known address of the person to whom it was directed, that person being a third-party recordkeeper within the meaning of § 7603(b). I sent the summons to the following address: 701 S. Olive Avenue, Apt. 104, West Palm Beach, Florida 33401

Signature	Title
Mary Engleder	Internal Revenue Agent

4. This certificate is made to show compliance with IRC Section 7609. This certificate does not apply to summonses served on any officer or employee of the person to whose liability the summons relates nor to summonses in aid of collection, to determine the identity of a person having a numbered account or similar arrangement, or to determine whether or not records of the business transactions or affairs of an identified person have been made or kept.

I certify that, within 3 days of serving the summons, I gave notice (Part D of Form 2039) to the person named below on the date and in the manner indicated.

Date of giving Notice: 09/28/2010 Time: 1:50 p.m.

Name of Noticee: See Exhibit B

Address of Noticee (if mailed): See Exhibit B

How Notice Was Given

- [X] I gave notice by certified or registered mail to the last known address of the noticee.
- [ ] I left the notice at the last and usual place of abode of the noticee. I left the copy with the following person (if any):
- [ ] I gave notice by handing it to the noticee.
- [ ] In the absence of a last known address of the noticee, I left the notice with the person summoned.
- [ ] No notice is required.

Signature	Title
Mary Engleder	Internal Revenue Agent

I certify that the period prescribed for beginning a proceeding to quash this summons has expired and that no such proceeding was instituted or that the noticee consents to the examination.

Signature	Title
Mary Engleder	Internal Revenue Agent

Exhibit A- Beekman Vista, Inc.

Definitions:

Beekman Vista, Inc. means Beekman Vista, Inc. (BVI) and any entities owned by BVI that are disregarded for federal income tax purposes.

Dynamo Holdings LP means Dynamo Holdings LP (DHLP) and any entities owned by DHLP that are disregarded for federal income tax purposes.

Person(s) means an individual, a trust, estate, partnership, association, company or corporation.

Produce the following documents for the period January 1, 2005 through December 31, 2007 unless a different time frame is specified:

1. Copies of the original and all amended articles of incorporation (whenever created) of BVI.

2. All organizational charts reflecting all corporations and/or other entities related to, or affiliated with, BVI.

3. All organizational charts and other documents reflecting all persons that owned either a direct or indirect interest in BVI during the periods ending December 31, 2005, December 31, 2006, and December 31, 2007.

4. BVI's complete financial statements with notes thereto (including certified financial statements and audited financial statements) for the period January 1, 2005 through the current year.

5. BVI's stock ledgers.

6. Documentation reflecting all members of the board of directors of BVI.

7. Documents reflecting all officers of BVI.

8. All Notes, loan agreements, mortgages, and security interests between BVI and third parties.

Delia Moog's Transfer of $100,000,000 to DHLP During Tax Year 2005

9. All correspondence, e-mails, cancelled checks, wire transfers, memoranda, and other documents (including negotiations) from January 1, 2005 through the present, reflecting loans BVI made to Delia Moog during 2005. This includes all such documents referencing either an actual transfer to Delia Moog or a constructive transfer by BVI to DHLP.

10. All account statements, wire transfers, ledgers, and other documents from January 1, 2005 through the present, reflecting BVI's receipt of principal and interest payments on loans BVI made to Delia Moog during 2005.

11. All documents reflecting the nature (as a loan, contribution to capital or purchase price for property) of the $100,000,000 that either (i) BVI advanced to DHLP, or (ii) Delia Moog advanced to DHLP.

12. All account statements, wire transfers, ledgers and other documents from January 1, 2005 through the

present, reflecting Delia Moog's payment of principal and interest on loans made by BVI during 2005.

13. All cancelled checks, wire transfers, ledgers, and other documents reflecting BVI's transfer of $100,000,000 to DHLP during the tax year 2005.

14. All account statements, wire transfers, ledgers and other documents from January 1, 2005 through the present, reflecting repayment of the loans Delia Moog made to DHLP during 2005.

BVI's loans to DHLP

15. All correspondence, e-mails, memoranda, and all other written communications reflecting the negotiations preliminary to all loan agreements made between BVI and DHLP during 2005, 2006, and 2007.

16. All correspondence, e-mails, memoranda, and all other written communications reflecting the purposes of all loans BVI made to DHLP during 2005, 2006, and 2007.

17. All correspondence, e-mails, memoranda, and all other written communications from the period January 1, 2005 through the present, reflecting the ability of DHLP to repay the loans made by BVI during 2005, 2006, and 2007.

18. All documents submitted by DHLP during the period January 1, 2005 through the present, reflecting the ability of DHLP to repay all loans made by BVI during 2005, 2006, and 2007.

19. All documents submitted by DHLP reflecting DHLP's debt to equity ratio at year end December 31, 2005, December 31, 2006, and December 31, 2007.

20. All documents submitted by Dynamo LLC from the period January 1, 2007 through the present, reflecting the ability of Dynamo LLC to repay all loans made by BVI during 2007.

21. All documents submitted by Dynamo LLC reflecting Dynamo LLC's debt to equity ratio at December 31, 2007.

22. All documents submitted by RJ-K Newco, LLC during the period January 1, 2007 through the present, reflecting the ability of RJ-K Newco, LLC to repay all loans made by BVI during 2007.

23. All documents submitted by RJ-K Newco, LLC reflecting RJ-K Newco, LLC's debt to equity ratio at year end December 31, 2007.

24. All minutes of meetings and/or resolutions of BVI from the period January 1, 2005 through the present, mentioning its loans made to DHLP during 2005, 2006, and 2007 (except for the Loan Restructuring Agreement).

25. All cancelled checks, wire transfers, ledgers, and other documents reflecting the loans BVI made to DHLP except those documents identified in footnote 1 as already in the Service's possession.

26. All documents reflecting the transfers of cash and property other than cash that BVI advanced to DHLP as loans (excluding all loan documents).[1]

27. All documents including appraisals reflecting the fair market value of The Grande at Mirasol, LLC at the time of its transfer to DHLP.

28. All financial statements, including the notes thereto, for The Grande at Mirasol, LLC at the time of its transfer to DHLP.

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[1] The Service currently has the following account statements:

(1) The Suntrust account statements with account number ending 5786, for the period 01/01/2006-1/31/2006, 2/01/2006-2/28/2006, 3/01/2006-3/31/2006, 5/01/2006-5/31/2006, 6/01/2006-6/30/2006, 3/01/2007-3/31/2007, 8/01/2007-8/31/2007, 10/1/2007-10/31/2007, and 11/01/2007- 11/30/2007.

(2) The JP Morgan Chase account statement with account number ending 1670, for the period 12/31/2005-1/31/2006, and 9/01/2006-9/29/2006.

(3) The Toronto Dominion account statement with account number 0584-7330082, for the period 11/30/2006 through 12/29/2006.

(4) A letter provided by U.S. Bank dated May 10, 2010 referencing a transfer of $24,244,289.23 in book value of securities from the account of BVI to the account of Kolter Communities, LLC and a transfer of $197,024,223.17 in book value of securities from the account of BVI to the account of Kolter Capital, LLC, and a document referencing the merger of The Grande at Mirasol, Inc. into The Grande at Mirasol, LLC.

29. All documents reflecting BVI's receivable(s) as a result of the transfer of The Grande at Mirasol, LLC to DHLP.

30. All documents reflecting BVI's transfer of title to assets other than cash to DHLP as loans, contributions to capital, or sales during 2005, 2006, and 2007.[2]

31. All ledgers, bank account statements and all other documents from the period January 1, 2005 through the present, reflecting BVI's receipt of principal and interest payments on the loans BVI made to DHLP during 2005, 2006, and 2007.

32. All written demands by BVI to DHLP during the period January 1, 2005 through the present, for payment of principal and/or interest on loans made by BVI during 2005, 2006, and 2007.

33. All documents reflecting the calculation of $25,607,340 in accrued interest claimed to have been owed to BVI by DHLP during the taxable year ending December 31, 2006.

34. All documents reflecting the calculation of $17,220,492 in accrued interest claimed to have been

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[2] Except (i) a letter provided by U.S. Bank dated May 10, 2010 referencing a transfer of $24,244,289.23 in book value of securities from the account of BVI to the account of Kolter Communities, LLC and a transfer of $197,024,223.17 in book value of securities from the account of BVI to the account of Kolter Capital, LLC, and (ii) a document referencing the merger of The Grande at Mirasol, Inc. into The Grande at Mirasol, LLC.

owed to BVI by DHLP during the taxable year ending December 31, 2007.

35. All ledgers, bank account statements and all other documents reflecting BVI's receipt of $6,468,000.00 from Dynamo LLC during the period December 31, 2009 through January 31, 2010.

36. All documents reflecting the nature of the $6,468,000.00 payment BVI received from Dynamo LLC during the period December 31, 2009 through January 31, 2010.

37. All documents reflecting the calculation of the alleged interest payment of $6,468,000.00 from Dynamo LLC during the period December 31, 2009 through January 31, 2010.

38. All written demands made during the period December 31, 2007 through the present, for payment of principal and/or interest on the loans of $220,000,000 and $146,000,000 BVI made to Dynamo LLC and RLJ Holdings, LLC, respectively.

39. All ledgers, account statements and all other documents reflecting the receipt and the nature of the $4,292,400.00 BVI received from RLJ Holdings, LLC during the period January 1, 2010 through January 31, 2010.

40. All documents reflecting the calculation of the interest payment of $4,292,400.00 BVI received from RLJ Holdings, LLC during the period January 1, 2010 through January 31, 2010.

41. All mortgages, security interests[3] and guarantees that BVI received from any persons in connection with loans BVI made to one or more of the following persons during 2005, 2006, and 2007: (i) DHLP, (ii) Dynamo LLC, and (iii) RLJ Holdings, LLC.

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[3] Except for the following security agreements: (1) the General Security Agreement by and among BVI and RJ-K Newco, LLC, (2) the General Security Agreement by and among BVI and Kolter Capital, LLC, and (3) the General Security Agreement by and among BVI and Dynamo LLC.

Exhibit B -Beekman Vista, Inc.

Dynamo Holdings Limited Partnership
Michael Clarke, as CFO of Dynamo GP, Inc., as General Partner of Dynamo Holdings Limited Partnership
701 S. Olive Avenue, Apt. 104,
West Palm Beach, FL 33401

Beekman Vista, Inc.
Michael Clarke, as CFO of Beekman Vista, Inc.
701 S. Olive Avenue, Apt. l 04,
West Palm Beach, FL 33401

Dynamo LLC
Michael Clarke
701 S. Olive Avenue, Apt. 104,
West Palm Beach, FL 33401

RJ-K Newco, LLC and/or RLJ Holdings, LLC
Robert Julien
1601 N. Ocean Boulevard
Gulf Stream, FL 33483

Delia Moog
1281 Gulf of Mexico Drive, Unit 1107
Longboat Key, FL 34228

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 11-mc-80456-RYSKAMP/VITUNAC

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF BEEKMAN VISTA, INC., RESPONDENT

July 18, 2011

RESPONSE OF MICHAEL CLARKE AS CHIEF FINANCIAL OFFICER OF BEEKMAN VISTA, INC., TO PETITION TO ENFORCE INTERNAL REVENUE SUMMONS WITH RETURN DATE OCTOBER 25, 2010

Respondent, Michael Clarke, in his capacity as Chief Financial Officer of Beekman Vista, Inc., ("Mr. Clarke as Beekman CFO") pursuant to the Court's Order Requiring Response (DE. #4) files his written response to the Petition to Enforce Internal Revenue Summons (DE #1) stating why he should not comply with and obey the Internal Revenue Summons referenced therein and says:

1. The allegations of paragraphs 1-3 and 5-7 are admitted.

2. As to paragraph 4, although Revenue Agent Fierfelder and the Government have examined the tax returns of Dynamo Holdings Limited Partnership ("DHLP") for the years ended December 31, 2005, 2006 and 2007, and raised issues with respect to debt and interest, the Government completed its examination in respect of those matters and issued its "Notice of Final Partnership Administrative Adjustment," ("FPAA") on December 28, 2010, just short of the expiration of the statute of limitations for doing so, without enforcing the summons having a return date of October 25, 2010 that is the subject of this petition. Moreover, on February 1, 2011, DHLP filed in the United States Tax Court a "Petition for Readjustment of Partnership Items Under Code Section 6226," assigned Docket number 2685-11, (the "Tax Court Petition") copy attached as Exhibit 1, with a copy of the FPAA attached to it as Exhibit "A", challenging the conclusions reached by the Government in the FPAA, including the issues relating to the debt and interest that the Government claims justifies the enforcement of the summons at issue here. Those issues are now the subject of active litigation between DHLP and the Government in the Tax Court and, upon information and belief, the Government has no power to amend the FPAA. In the Tax Court, discovery by the parties is strictly limited. Absent an order of the Tax Court or the stipulation of the parties, discovery of the sort called for in the summons that is at issue here is not permitted in the Tax Court. This enforcement proceeding was not commenced until April 28, 2011, near-

ly three months after the filing of the Tax Court Petition. Based upon the facts that:

A. The FPAA was issued in December, 2010 without the information sought in the summons at issue here,

B. The FPAA cannot be amended,

C. The discovery sought by the summons is claimed by the Government to be relevant to the same issues that are now in active litigation between DHLP and the Government in the Tax Court, and

D. Such discovery is limited to the Government in the Tax Court,

it is obvious that the real reason the Government is seeking to enforce the summons at this time is to circumvent the discovery rules in the Tax Court, not to "obtain testimony and records regarding the tax reporting obligations of DHLP" as alleged in paragraph 4.

3. As to paragraph 8, while it is true that Mr. Clarke as Beekman CFO did not appear before Ms. Fierfelder on October 25, 2010, the truth is that before the issuance of the instant summons, DHLP and all of the other persons summoned or requested to provide information about DHLP, including Beekman Vista, Inc. (hereinafter "Beekman"), through their counsel, proceeding informally for more than a year before the summons was issued, provided Ms. Fierfelder and the

Government with all of the information needed by them to analyze the "tax reporting obligations of DHLP" and to finalize and issue the FPAA. Mr. Clarke as Beekman CFO was involved in gathering and providing all information requested of Beekman Vista, Inc., and was, in fact, interviewed by an agent other than Ms. Fierfelder. Furthermore, substantial parts of what is presently requested was previously provided in responding to the earlier inquiries. Therefore, Mr. Clarke as Beekman CFO denies the allegation that he has not produced any material or provided any testimony the summons seeks.

4. As for paragraph 9, Mr. Clarke as Beekman CFO admits that the government must establish the matters set forth in *United States v. Powell*, 379 U.S. 48 (1964) to obtain enforcement of an IRS summons, but he denies that the government burden is satisfied by the filing of an affidavit or unsworn declaration of the agent who issued the summons, especially where the assertions contained in the affidavit or declaration are contested by the respondent and he affirmatively alleges that *Powell* contemplates the availability of defenses to such summonses.

5. Based upon the information set forth in paragraphs 2 through 4, above, Mr. Clarke as Beekman CFO denies the allegations of paragraph 10.

6. In response to the allegations of paragraph 11, Mr. Clarke as Beekman CFO incorporates by reference his response to paragraph 4 of the Petition which appears at paragraph 2 above.

7. Mr. Clarke as Beekman CFO is without knowledge of the truth or falsity of the allegations of paragraph 12, and therefore denies them and demands strict proof of them. All documents in the possession custody or control of Mr. Clarke as Beekman CFO necessary for the Government to conduct its examination of DHLP's tax returns in respect of the identified issues were shared with the Government and they should have them.

8. Mr. Clarke as Beekman CFO denies that the summons was not issued for an improper purpose,[1] but is without knowledge whether all administrative steps required by the Internal Revenue Code for the issuance of the summons have been followed, and therefore denies that allegation and demands strict proof of it.

9. Mr. Clarke as Beekman CFO is without knowledge of the truth or falsity of the allegations of paragraph 14, and therefore denies them and demands strict proof of them.

---

[1] Eliminating the double negative, Mr. Clarke as Beekman CFO affirmatively alleges that the summons was issued for an improper purpose, and that this proceeding is being prosecuted for an improper purpose.

FIRST AFFIRMATIVE DEFENSE
(Improper Purpose—Prohibited Beekman Re-examination)

Attorneys from IRS District Counsel have alleged to counsel for DHLP and Beekman that the loans from Beekman to DHLP that are the subject of the summons should be characterized as distributions by Beekman to members of the families who indirectly own both Beekman and DHLP. Much of the data sought in the summons is an improper subterfuge to obtain evidence for a possible deficiency against Beekman. Beekman has pointed out that Beekman has already been examined and paid a liability, including interest, of $28,058,754.00. This summons should be dismissed as an improper subterfuge to obtain data for a prohibited duplicative examination of Beekman.

SECOND AFFIRMATIVE DEFENSE
(Improper Purpose—Retribution for Refusal to Extend Tolling Agreement)

In 2010, after DHLP had twice agreed to toll the applicable statute of limitations, the Government asked DHLP to agree to yet another extension of the tolling agreement. DHLP refused to grant another extension and, immediately thereafter, despite having not asked for additional information for some time, the Government suddenly issued the instant summons and five others basically reopening requests that had been initially made years before and resolved through informal proceedings. Furthermore, despite the impending deadline for the Government to take action,

the Government made no effort to enforce the instant summons and instead went forward and issued the FPAA. If the Government needed the information sought by the summons for the stated purpose, it would not have delayed in seeking enforcement until after issuing the FPAA and after the filing of the Tax Court Petition. Therefore, the reason for the issuance of the summons and five others in September, 2010, was not for the now claimed purpose of obtaining information for analysis of the tax reporting of DHLP, but, instead, was for the improper purpose of punishing DHLP for refusing to agree to a further extension of the applicable statute of limitations.

THIRD AFFIRMATIVE DEFENSE
(Abuse of Process)

Even if the Government arguably had a legitimate purpose for issuing the summons when it was issued, the summons was never used for that purpose. Instead, after the summons was issued for the purpose of investigating the tax reporting of DHLP, nothing was done with them during the time that the Government had a right to make such investigation. Moreover, the Government at the time the summons was issued advised counsel for DHLP that once the FPAA was filed and a Tax Court Petition filed, such summonses would not be enforced. Thereafter, the FPAA was issued, the Tax Court Petition was filed, and the Government answered. It was only after the Government answered the Tax Court Petition that the Government sought to enforce the summonses. Since the legiti-

mate purpose of such summonses is investigation of the tax reporting of United States taxpayers, and since such investigations with respect to partnerships like DHLP terminate either with the passage of time or with the issuance of an FPAA, and since, in this case, both the statute of limitations has passed and the FPAA has been issued, the summons cannot be used for the purpose for which it was intended. Instead, since it appears that the prosecution of the enforcement of the summons was initiated in consultation with counsel who are defending the Tax Court Petition, and since it is clear that the Tax Court rules do not permit such discovery, the issued process is being used for an improper purpose, which is evading the Tax Court limitations on discovery and harassing DHLP and Beekman. Therefore, the Government is guilty of abusing the process of this Court and enforcement of the summons should be denied.

FOURTH AFFIRMATIVE DEFENSE
(Comity and Practicality)

When two courts of competent jurisdiction are presented with the same controversy, absent compelling circumstances not present here, the court initially seized of the controversy should be the one to decide the case. *Merrill Lynch Pierce Fenner & Smith, Inc., v. Haydu*, 675 F. 2d 1169, 1174 (11th Cir. 1982). Here, issues of gathering of information relating to the tax returns of DHLP for the calendar years ending December 31, 2005, 2006 and 2007 are before the Tax Court in respect of the Tax Court Petition and the

discovery initiated there by the Government. The Tax Court Petition was filed before the petition to enforce the summons in this miscellaneous matter. Issues of relevance of the matter sought by the summons at issue here involve analysis of the entire tax controversy that is presently being contested before the Tax Court. The Tax Court is an Article I court whose decisions are precedential and appealable to the several United States Courts of Appeal. In this case, the appeal, if any, would be to the Eleventh Circuit Court of Appeals. Because the enforcement of the summons here would only be of use in connection with litigation of the Tax Court Petition, and because the Tax Court itself has seized the controversy and has procedures for obtaining discovery other than summonses, out of considerations of comity and practicality, this Court should dismiss this proceeding and relegate the parties to their remedies in the Tax Court.

DEMAND FOR EVIDENTIARY HEARING AND PREHEARING DISCOVERY

Having raised in a substantial way the existence of substantial deficiencies in the summons proceedings, Mr. Clarke as Beekman CFO demands an evidentiary hearing in respect of the issues raised in the Petition and this Response, and discovery from the Government before such hearing. *United States v. Southeast First National Bank of Miami Springs*, 655 F.2d 661 (5th Cir. Unit B, 1981).

WHEREFORE, Respondent prays the Court will dismiss the Petition to Enforce Internal Revenue

Summons, without requiring Respondent to provide any further information to Petitioner about issues with respect to debt and interest on DHLP's December 31, 2005, 2006, and 2007 tax returns, together with such other and further relief as may be appropriate in the circumstances.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 18, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ EDWARD A. MAROD
EDWARD A. MAROD, ESQ.
Florida Bar No. 238961
GUNSTER YOAKLEY & STEWART, P.A.
Attorneys for Michael Clarke as Chief Financial Officer of Beekman Vista, Inc.
777 S. Flagler Drive, Suite 500 E
West Palm Beach, FL 33401
Tel: (561) 655-1980
Fax: (561) 655-5677
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Service List:

Robert L. Welsh, Esq.
Trial Attorney, Tax Division
U.S. Department of Justice
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Washington, D.C. 20044

Telephone: (202) 514-6068
E-mail: Robert.L.Welsh@USDOJ.gov

UNITED STATES TAX COURT

Docket No. [2685-11]

DYNAMO HOLDINGS LIMITED PARTNERSHIP DYNAMO, GP, INC., TAX MATTERS PARTNER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

[Filed: Feb. 1, 2011]

PETITION FOR READJUSTMENT OF PARTNERSHIP ITEMS UNDER CODE SECTION 6226

Petitioner, Dynamo GP, Inc., Tax Matters Partner of Dynamo Holdings Limited Partnership ("Dynamo"), hereby petitions for a readjustment of the partnership items as set forth by Respondent, Commissioner of Internal Revenue, in its Notice of Final Partnership Administrative Adjustment (hereafter "FPM") dated December 28, 2010, and in support thereof states:

1. Petitioner is Dynamo GP, Inc. the Tax Matters Partner of Dynamo.

2. Petitioner's state of legal residence is Delaware and Petitioner's mailing address is 701 South Olive Avenue, Suite 104, West Palm Beach, FL 33401.

3. The name of the partnership is Dynamo Holdings Limited Partnership (hereinafter "the Partner-

ship"), a Delaware limited partnership have its principal place of business at 2711 Centerville Road Suite 400 Wilmington, Delaware and a mailing address at 701 S. Olive Avenue, Suite 104, West Palm Beach, FL 33401.

4. The Partnership's taxpayer identification number is XX-XXXXXXX. The Partnership filed its 2005, 2006 and 2007 Forms 1065, U.S. Return of Partnership Income with the Internal Revenue Service ("IRS"), in Ogden, Utah.

5. Respondent mailed to Petitioner the FPAA dated December 28, 2010, from the Denver, Colorado, IRS office by certified mail. Petitioner has attached a copy of that FPAA (and its attachments) to this Petition as Composite Exhibit A.

6. The FPAA was issued for the Partnership's three calendar taxable years 2005, 2006, and 2007.

* * * * *

WHEREFORE, Petitioner prays that this Court determine that the Respondent should not have made the proposed adjustments discussed above for 2005, 2006 and 2007, should not have imposed any Section 6662(a) penalty, and grant the Partnership such other and further relief to which it may be entitled.

Counsel for Petitioner

Gunster, Yoakley & Stewart, P.A.

By: /s/ MARTIN R. PRESS
MARTIN R. PRESS, ESQ.
450 Las E. Olas Blvd., Suite 1400
Ft. Lauderdale, FL 33301
Telephone: (954) 468-1314
Telefax: (954) 888-2040
Tax Court Bar No.: PM0240

By: /s/ LU-ANN MANCINI DOMINQUEZ
LU-ANN MANCINI DOMINGUEZ, ESQ.
450 E. Las Olas, Suite 1400
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Tax Court Bar No.: DL0204

By: /s/ ALAN S. LEDERMAN
ALAN S. LEDERMAN, ESQ.
450 E. Las Olas, Suite 1400
Ft. Lauderdale, FL 33301
Telephone: (954) 713-6415
Telefax: (954) 523-1722
Tax Court Bar No.: LA0333

DATED: Jan. [31], 2011

Internal Revenue Service
1999 Broadway
MS 4020 DEN: Drago
Denver, CO 80202

Tax Matters Partner
Dynamo Holdings Limited Partnership
701 South Olive Avenue, Apt. 104
West Palm Beach, FL 33401

Department of the Treasury
Date: [Dec 28 2010]
Taxpayer Identifying Number:
[REDACTED]
Name of Partnership:
Dynamo Holdings Limited Partnership
Partnership Identifying Number:
[REDACTED]
Tax Year Ended:
12/31/2005, 12/31/2006, and 12/31/2007
Contact Hours:
9:00 AM to 5:00 PM MST
Person to Contact:
Lee Drago
Employee ID Number:
[REDACTED]
Contact Telephone Number:
(303) 603-4731
Date FPAA Mailed to Tax Matters Partner:
[Dec 28 2010]

NOTICE OF FINAL PARTNERSHIP ADMINISTRATIVE ADJUSTMENT

The law requires us to send a Notice of Final Partnership Administrative Adjustment (FPAA) to the partnership named above, for the tax year shown above, and to each partner who is entitled to receive this notice.

We are proposing adjustments to the partnership items of the partnership and tax year shown above. We will send the examination report outlining these adjustments to the Tax Matters Partner (TMP) of the partnership. (The TMP is the partner designated by the partnership to deal with the IRS.) He/she is also authorized to act for the partners who are not entitled to receive this notice. Any partner who wants a copy of the examination report should request it from the TMP. If the TMP is unable to provide you with a copy of the examination report, please contact the person named in the heading of this letter.

Taxable Years Ending Before August 6, 1997:

The adjustments to the partnership items reported on the partnership tax return may cause an increase or decrease to the tax liability on your individual return. Form 870-P, *Agreement to Assessment and Collection of Deficiency in Tax for Partnership Adjustments*, is a summary of the proposed adjustments to the partnership return. You can compute your share of the proposed adjustments by multiplying each adjusted part-

nership item by your percentage interest for that partnership item.

Taxable Years Ending After August 5, 1997:

The adjustments to the partnership items reported on the partnership tax return may cause an increase or decrease in the tax liability on your individual return. The adjustments may include partnership level determinations regarding penalties and additions to tax that relate to adjustments to partnership items. Form 870-PT, *Agreement for Partnership Items and Partnership Level Determinations as to Penalties. Additions to Tax, and Additional Amounts,* is a summary of the proposed adjustments to the partnership return. IRC section 6651 late filing penalty applies to any late filed returns that are required to report the partnership item adjustments. You can compute your share of the proposed adjustments by multiplying each adjusted partnership item by your percentage interest for that partnership item.

You have three options available to you:

1. **If you agree with the adjustments:**

Sign and return the enclosed Form 870-P/Form 870-PT. When you sign Form 870-P/Form 870-PT, you are agreeing to pay any additional tax and interest resulting from the adjustments to the partnership return. For tax years ending after August 5, 1997, you are also agreeing to any partnership level determination as to penalties, additions to tax, and additional amounts that relate to adjustments to partner-

ship items, if any. In addition, you are waiving your rights to participate in any administrative or judicial proceeding affecting partnership items and in partnership level determinations as to penalties, additions to tax, and additional amounts that relate to adjustments to partnership items for the tax year in question. This is a binding settlement only if you sign and return Form 870-P/Form 870-PT and we sign on behalf of the Commissioner of Internal Revenue Service. When we sign the agreement form, the one-year extension of the period of limitations on assessments will begin under Internal Revenue Code section 6229(f). Once the agreement is signed by both parties, you may not file a claim to change the items in question or claim a refund/credit based on a readjustment.

Note: If you are the TMP of the partnership, see the section of this letter entitled, *"For the Tax Matters Partner o/the Partnership."*

2. If you do not agree with the adjustments:

If you are the TMP of the partnership and want to contest the adjustments in court, you must file a petition within 90 days from the date of this letter. During this 90-day period, no other partner may file a petition for judicial review. You can file your petition for readjustment of partnership items with:

1. the United States Tax Court;
2. the United States Court of Federal Claims; or

3. the District Court of the United States, in the district of the partnership's principal place of business.

A petition filed by the TMP precludes all other actions. If the TMP doesn't file a petition by the 90th day from the date the FPAA was mailed, any partner or any 5 percent group entitled to receive this notice may petition one of these courts. A "5 percent group" includes any group of partners who together have an interest of five percent or more in profits of the partnership. The petition must be filed after the 90th day, but on or before the 150th day from the date the FPAA was mailed to the TMP. If more than one petition is filed in Tax Court, the first petition filed will go forward. All other petitions (even those filed earlier in one of the other courts) will be dismissed. If no one files a petition in Tax Court, the first petition filed in one of the other courts will go forward and subsequent petitions will be dismissed. Petitions filed with the United States Tax Court must be mailed to:

United States Tax Court
400 Second Street, NW
Washington, DC 20217

Attach a copy of this letter to the petition. The time in which you must file a petition with the court is fixed by law and the court cannot consider your case if your petition is filed late. If this letter is addressed to both a husband and wife and both want to petition the Tax Court, both must sign the petition or each must file a separate signed petition.

When a partner (including each member of a 5 percent group that files a petition) files a petition in either the appropriate District Court or the Court of Federal Claims, the partner filing the petition must deposit the amount that the partner's tax liability would be increased if the treatment of the partnership items on the partner's return were made consistent with the treatment of partnership items under the FPAA. If you reported the partnership items the way the partnership reported them on its return, you can generally determine the amount to deposit by taking your pro rata share of the partnership adjustments into account in recomputing your tax. You must deposit the appropriate amount with the IRS on or before the day you file your petition.

3. If you do nothing:

If a petition for readjustment is not filed in any of the courts listed in this letter, the FPAA becomes final, and we will bill you for any additional tax plus interest that you may owe under the FPAA. You will not be permitted to contest the treatment of the partnership items of the partnership under the FPAA in any refund claim or suit. The law allows the Service to bill you after 150 days from the mailing date of the FPAA to the TMP.

However, if a petition is filed in the Tax Court, and the Tax Court upholds the adjustments in whole or in part, we will not bill you until the Tax Court decision is final.

You may wish to contact the TMP of the partnership or your tax advisor to discuss this matter.

If you have any questions, you can write to the person whose name and address are shown in the heading of this letter. If you write, attach a copy of this letter to help identify your account. Also, include your telephone number and the most convenient time for us to call you in case we need additional information.

If you prefer, you may call the IRS contact person at the telephone number shown in the heading of this letter.

Thank you for your cooperation.

Sincerely,

/s/ JOHN W. JOSEPH
JOHN W. JOSEPH
Territory Manager,
Technical Services, Western

Enclosures:
Form 870-P/Form 870-PT
Copy of this letter

cc: Martin R. Press, Esq. and Sara Gundlach

FOR THE TAX MATTERS PARTNER OF THE PARTNERSHIP

If you are the Tax Matters Partner (TMP), you are entitled to make an agreement to bind non-notice partners to the treatment of the partnership items as shown on the enclosed schedule of adjustments. You must add the following statement above the signature blocks on the Form 870-P or Form 870-PT:

"The undersigned Tax Matters Partner is signing this offer on behalf of himself (herself) and all other partners whom he (she) has the authority to bind; a final agreement resulting from the co-signature of the Commissioner of Internal Revenue will be binding on all such other partners."

As the TMP, you may submit a petition, as described above for the partnership on behalf of all partners.

If you have any questions, you can call the IRS contact person at the telephone number shown in the heading of this letter. Thank you for your cooperation.

FPAA

Form **4605-A**

Department of the Treasury — Internal Revenue Service

Examination Changes - Partnerships, Fiduciaries, S Corporations, and Interest Charge Domestic International Sales Corporations (Unagreed and Excepted Agreed)

Name and address	Employer Identification Number	Form Number
Dynamo Holdings Limited Partnership 701 South Olive Avenue Apartment 104 West Palm Beach, Florida 33401	[redacted]	1065
	Person Examination Changes Were Discussed With	Name: Martin Press Title: Representative

1. Adjustments to ordinary, distributable net, or taxable income.	Period End: 12/31/2005	Period End: 12/31/2006	Period End: 12/31/2007
1.a. Gross Receipts	236,316.00		
1.b. Ordinary loss from other Partnerships, Estates and Trusts	(5,390,013.00)		(71.00)
1.c. Depreciation	7,982.00		
1.d. Other deductions	2,081,466.00		
1.e. Cost of goods sold		5,234,634.00	5,818,210.00
1.f. Interest Expense		8,185,666.00	0.00
1.g. Other Deductions Line 20 (Airplane Expense)		42,057.00	25,791.00
2. Total adjustments to ordinary, distributable net, or taxable income.	(3,064,249.00)	13,462,357.00	5,843,930.00
3. Ordinary, distributable net, or taxable income as reported.	(2,276,462.00)	(9,611,752.00)	(23,389,170.00)
4. Corrected ordinary, distributable net, or taxable income.	(5,340,711.00)	3,850,605.00	(17,545,240.00)
5. Other adjustments	[redacted]		
a. F 1065, Sch K Line 2 Net Rental Inc/(loss) Form 8825			
(1) Adjustment	610,212.00	(448,351.00)	(493,893.00)
(2) As Reported	(692,979.00)	(3,065,670.00)	(711,636.00)
(3) Corrected	(82,767.00)	(3,514,021.00)	(1,205,529.00)
b. Form 1065 Sch K Line 13b Investment Interest Expense	[redacted]		
(1) Adjustment	8,650.00	17,421,674.00	16,921,256.00
(2) As Reported	709,554.00	19,656,535.00	18,956,932.00
(3) Corrected	700,904.00	2,234,861.00	2,035,676.00

Remarks

See next page for more "Other adjustments" and Balance Sheet Changes

The accuracy-related penalties under I.R.C. section 6662(a) are applicable to all underpayments of tax attributable to adjustments of partnership items determined herein.

The attached Explanation of Adjustments is hereby incorporated by reference in this Form 4605-A and FPAA. Any adjustments not shown on this Form 4605-A but contained in the attached Explanation of Adjustments are hereby incorporated into this Form 4605-A and FPAA.

Examiner's Signature	Employee ID	Area Office	Date
Name: Mary K. Fierfelder	[redacted]	West Palm Beach	08/11/2010

FPAA

Taxpayer: Dynamo Holdings Limited Partnership
TIN: [redacted]

Form 4605-A – Other Adjustments (Continued)

	Period End: 12/31/2005	Period End: 12/31/2006	Period End: 12/31/2007
c. F 1065, Schedule L Line 17,Other Current Liabilities (Ending)			
(1) Adjustment			(138,014,172.00)
(2) As Reported			138,497,411.00
(3) Corrected			483,239.00
d. Schedule L, Line 20, Other Liabilities (Ending)			
(1) Adjustment	(357,949,054.00)	(740,307,482.00)	(109,042,836.00)
(2) As Reported	498,151,841.00	827,958,127.00	296,621,403.00
(3) Corrected	140,202,787.00	87,650,645.00	187,578,567.00
e. Form 1065 Schedule K Line 5 Interest Income			
(1) Adjustment	1,111,948.00		69,602.00
(2) As Reported	25,491.00		19,785,742.00
(3) Corrected	1,137,439.00		19,855,344.00
f. Form 1065 Discharge of Debt Income			
(1) Adjustment			754,851,075.00
(2) As Reported			0.00
(3) Corrected			754,851,075.00
g. Distributions of Cash, Marketable Securities, and/or Other Property			
(1) Adjustment			370,330,076.00
(2) As Reported			0.00
(3) Corrected			370,330,076.00
h. Schedule L, Line 20, Other Liabilities (Beginning)			
(1) Adjustment		(357,949,054.00)	(740,307,482.00)
(2) As Reported		498,151,841.00	827,958,127.00
(3) Corrected		140,202,787.00	87,650,645.00
i. Schedule K, Line 13d, Other Deductions			
(1) Adjustment	(27,420.00)	0.00	100,146.00
(2) As Reported	89,820.00	1,804,701.00	1,417,248.00
(3) Corrected	62,400.00	1,804,701.00	1,517,394.00
j. See 2 attachments to F4605-A for continuation of other adjustments			
(1) Adjustment			
(2) As Reported			
(3) Corrected			
[redacted]			
(1) Adjustment			
(2) As Reported			
(3) Corrected			
[redacted]			
(1) Adjustment			
(2) As Reported			
(3) Corrected			
[redacted]			
(1) Adjustment			
(2) As Reported			
(3) Corrected			
[redacted]			
(1) Adjustment			
(2) As Reported			
(3) Corrected			

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Form 4605-A Attachment for
Dynamo Holdings Limited Partnership
[redacted]
TYE 12/31/2005
Other Adjustment Lines

Sch K Line No.s	Partners' Distributive Share Items	AS REPORTED	CORRECTED	ADJUSTMENT
13a	CONTRIBUTIONS	0	1,250	1,250
17a	POST 1986 DEPRECIATION ADJUSTMENT	48,583	46,676	(1,907)
20a	INVESTMENT INCOME	5,236,806	6,348,754	1,111,948
20b	INVESTMENT EXPENSES	89,820	62,400	(27,420)

Form 4605-A Attachment for
Dynamo Holdings Limited Partnership
[redacted]
TYE 12/31/2007
Other Adjustment Lines

Sch K Line No.s	Item	AS REPORTED	CORRECTED	ADJUSTMENT
6a	ORDINARY DIVIDENDS	2,797,764	2,825,645	27,881
6b	QUALIFIED DIVIDENDS	1,735,717	1,748,738	13,021
7	ROYALTIES	49	148	99
8	NET ST CAPITAL GAIN	11,029,500	11,088,485	58,985
9a	NET LT CAPITAL GAIN	14,842,471	15,132,788	290,317
11	OTHER INCOME	(1,844,536)	(241,272)	1,603,264
16b	GROSS INCOME FROM ALL SOURCES	22,431,089	24,678,494	2,247,405
16c	GROSS INCOME SOURCED AT PARTNER LEVEL	18,902,931	20,622,280	1,719,349
16d	PASSIVE	1,441,516	1,623,912	182,396
16e	GENERAL CATEGORY FOREIGN SOURCE INCOME	47,759	47,823	64
16f	FOREIGN SOURCE INCOME - OTHER	10,010	10,013	3
16g	INTEREST EXPENSE	946,416	1,245,603	299,187
16h	OTHER DEDUCTIONS	11,480,302	11,615,893	135,591
16i	PASSIVE	199,469	229,780	30,311
16k	OTHER	9,129	9,130	1
16l	TOTAL FOREIGN TAXES	113,039	119,788	6,749
16c	NONDEDUCTIBLE EXPENSES	35,151	35,165	14
20a	INVESTMENT INCOME	22,040,880	22,141,249	100,369
20b	INVESTMENT EXPENSES	774,296	874,084	99,788
20v	UNRELATED BUSINESS TAXABLE INCOME	0	218,485	218,485

Form 886-A (Rev. January 1994)	Explanations of Items	Schedule No. or Exhibit
Name of Taxpayer	Tax Identification Number	Year/Period Ended
DYNAMO HOLDINGS LIMITED PARTNERSHIP	[redacted]	2005, 2006, 2007

1. a. Gross Receipts (2005)

It is determined that you received gross receipts from Kast Construction, LLC, as shown below, that were not reported on your U.S. Return of Partnership Income for the taxable year ending December 31, 2005.

Accordingly, your ordinary business loss is decreased as follows:

Source	2005
Kast Construction LLC	$ 238,316
Per Exam	$ 238,316
Per Return	0
Decrease in Ordinary Business Loss	$ 238,316

1.b. Ordinary Loss from Other Partnerships, Estates, and Trusts (2005 and 2007)

It is further determined that you are entitled to an ordinary loss from other partnerships, estates, and trusts in the amount of $5,390,013, as claimed on an amended Form 1065 for the taxable year ended December 31, 2005. Accordingly, your ordinary business loss is increased in the amount of $5,390,013 for the taxable year ended December 31, 2005.

It is further determined that you are allowed an additional ordinary loss from other partnerships, estates, and trusts for the taxable year ending December 31, 2007 in the amount of $71.00 based on a Schedule K-1 received from OCM Opportunities Fund VI, L.P. Accordingly, your ordinary business loss is increased in the amount of $71 for the taxable year ended December 31, 2007.

1.c. Depreciation (2005)

It is further determined that you are entitled to a depreciation deduction in the amount of $29,358 for the taxable year ended December 31, 2005, instead of $37,340 as reported on your original income tax return for that tax year. You have not established that you are entitled to more depreciation than $29,358 under applicable law and regulations. Accordingly, your ordinary business loss is decreased in the amount of $7,982.00 for the taxable year ended December 31, 2005.

Form 886-A (Rev. January 1994)	Explanations of Items	Schedule No. or Exhibit
Name of Taxpayer	Tax Identification Number	Year/Period Ended
DYNAMO HOLDINGS LIMITED PARTNERSHIP	[redacted]	2005, 2006, 2007

1.d. Other Deductions

It is further determined that the Other Deductions claimed on your original income tax return for the taxable year ended December 31, 2005 are adjusted as shown below because you have not shown that any amounts, in excess of the corrected amounts, represent ordinary and necessary business expenses, were paid, or if paid, were paid for the purposes designated:

Item	As Reported	As Corrected (Before Disallowance of Airplane Expenses Below)
Travel & Entertainment	$ 543	$ 543
Advertising & Marketing	3,204,785	1,441,431
Indirect Home Selling Costs	330,113	77,017
Office Expense	1,400	1,400
Professional Fees	25,243	25,243
Fees and Licenses	20,289	20,289
Insurance	65,016	0
Total	$3,647,389	$1,565,923

Accordingly, your ordinary business loss is decreased in the amount of $2,081,466.00 for the taxable year 2005.

1.e. Page 1 Line 2 - Cost of Goods Sold

It is further determined that a portion of the deductions claimed for cost of goods sold are disallowed to the extent shown below. You are required to capitalize and/or include in inventory costs the following amounts under Internal Revenue Code section 263A and applicable regulations. Accordingly, your ordinary business income is increased as follows:

Year	Per Return	Per Exam	Increase in Business Income
2006	$ 40,168,532	$ 34,933,898	$ 5,234,634
2007	$ 16,657,592	$ 10,839,382	$ 5,818,210

Form 886-A (Rev. January 1994)	Explanations of Items	Schedule No. or Exhibit
Name of Taxpayer	Tax Identification Number	Year/Period Ended
DYNAMO HOLDINGS LIMITED PARTNERSHIP	[redacted]	2005, 2006, 2007

1.f. Interest Expense

It is further determined that your claimed interest deduction for the taxable year ended December 31, 2006 is disallowed in the amount of $8,185,666, since it has not been established that the disallowed amount represents paid or accrued interest with respect to bona-fide indebtedness. Accordingly, your ordinary business income is increased as follows:

Year	Per Return	Per Exam	Increase in Business Income
12/31/2006	$ 18,192,267	$ 10,006,601	$ 8,185,666

1.g. Other Deductions Line 20 (Airplane Expense)

It is further determined that the Other Deductions claimed on your income tax return for the taxable year ended December 31, 2007 related to airplane expenses are disallowed in the amounts of $42,057 and $25,791 for the tax years 2006 and 2007, respectively. It has not been established that the disallowed amounts represent ordinary and necessary business expenses, were paid, or if paid, were paid for the purposes designated. Furthermore, personal expenses are not deductible. Additionally, your allowable deductions for these items are limited under Internal Revenue Code sec. 274. Accordingly, your ordinary business income is increased in the amounts of $42,057 and $25,791 for the tax years 2006 and 2007, respectively.

Rental Real Estate F 1065 Sch K Line 2 Loss (Depreciation from The Grande at Mirasol)

It is determined that during the taxable year ended December 31, 2005, you had unreported rental income from The Grande at Mirasol, LLC. It is further determined that for the taxable years ending 2005, 2006 and 2007, depreciation related to The Grande at Mirasol, LLC is adjusted based on corrected depreciable basis and recovery periods for the property. Accordingly, your Net Rental Real Estate Income (loss) is adjusted as follows:

Source	2005	2006	2007
Per Exam Rental Loss	$ (82,767)	$ (3,514,021)	$ (1,205,529)
Per Return Rental Loss	$ (692,979)	$ 3,065,670	$ (711,636)
Adjustment to Depreciation	$ 448,683	$ (448,351)	$ (493,893)
Rental Real Estate Income not Reported	161,529	0	0
Adjustment to Rental Loss	$ 610,212	$ (448,351)	(493,893)

Form 886-A (Rev. January 1994)	Explanations of Items	Schedule No. or Exhibit
Name of Taxpayer	Tax Identification Number	Year/Period Ended
DYNAMO HOLDINGS LIMITED PARTNERSHIP	[redacted]	2005, 2006, 2007

Form 1065 Schedule K Line 13b Investment Interest Expense

It is determined that your deduction for investment interest expense for the taxable year ended December 31, 2005 is in the amount of $700,904, rather than $709,554, as indicated on an amended Form 1065 for that tax year. Furthermore, you have not established that any amounts, in excess of the corrected amount, represent ordinary and necessary business expenses, were paid, or if paid, were paid for the purposes designated. Accordingly, your deduction for investment interest expense is decreased in the amount of $8,650 for the taxable years ended December 31, 2005.

It is further determined that your claimed deductions for investment interest expense are disallowed in the amounts of $17,421,674 and $17,220,493 for the taxable years ended December 31, 2006 and December 31, 2007, respectively because it has not been established that the disallowed amounts represent interest paid or accrued on bona-fide indebtedness.

It is further determined that you are entitled to additional deductions for investment interest expense for the taxable year ended December 31, 2007 as distributive shares from the following partnerships:

Partnership	Amount
OCM Opportunities Fund VI, LP	$ 26
Flag Venture Partners III, LP	187
Oz Domestic Partners, LP	204,901
The Raptor Global Fund, LP	94,123
Total	$299,237

Accordingly, your claimed deductions for investment interest expense are decreased in the amounts of $17,421,674 and $16,921,256 for the taxable years ended December 31, 2006 and December 31, 2007, respectively.

Form 1065, Schedule L Line 17, Other Current Liabilities

It is determined that the amounts reported as Other Current Liabilities on your income tax return for the taxable year ended December 31, 2007 are allowed to the extent shown below because it has not been established that the "Intercompany Payable" claimed in the amount of $138,014,172 as of December 31, 2007 represents liabilities or bona-fide indebtedness.

Schedule L, Line 17, Other Current Liabilities

Year Ended	*Other Current Liabilities per return*	*Per Exam*	*Disallowance of "Intercompany Payable"*
12/31/2007	*$138,497,411*	*$483,239*	*$(138,014,172)*

Form 886-A (Rev. January 1994)	Explanations of Items	Schedule No. or Exhibit
Name of Taxpayer	Tax Identification Number	Year/Period Ended
DYNAMO HOLDINGS LIMITED PARTNERSHIP	[redacted]	2005, 2006, 2007

Form 1065, Schedule L Line 20, Other Liabilities

It is determined that the claimed amounts as Other Liabilities for the taxable years ended December 31, 2005, December 31, 2006, and December 31, 2007 are allowed to the extent shown below. Other Liabilities have been reduced to reflect that amounts purportedly loaned to Dynamo Holdings Limited Partnership do not constitute liabilities or bona-fide indebtedness."

Schedule L, Line 20, Other Liabilities (Beginning)

Date	Per Return	Per Exam	Adjustment
1/1/2005	-0-	-0-	-0-
1/1/2006	$498,151,841	$140,202,787	$(357,949,054)
1/1/2007	$627,958,127	$87,650,645	$(740,307,482)

Schedule L, Line 20, Other Liabilities (Ending)

Date	Per Return	Per Exam	Adjustment
12/31/2005	$498,151,841	$140,202,787	$(357,949,054)
12/31/2006	$627,958,127	$87,650,645	$(740,307,482)
12/31/2007	$296,621,403	$187,578,567	$(109,042,836)

Discharge of Debt Income

In the event that amounts transferred by Beekman Vista, Inc. and/or Delia Moog gave rise to bona-fide indebtedness at the time of transfer, then it is determined that for the taxable year ending December 31, 2007, *you* must recognize unreported income from the discharge of indebtedness in the amount of $754,851,075 under Internal Revenue Code section 61(a)(12), as shown below.

Claimed Creditor	Amount
Beekman Vista, Inc.	$645,808,239
Delia Moog	109,042,836
Total	$754,851,075

In the event that amounts transferred by Beekman Vista, Inc. and/or Delia Moog gave rise to bona-fide indebtedness at the time of transfer, you have additional discharge of debt income in the amount of $754,851,075 for the taxable year ended December 31, 2007.

Form 1065, Schedule K, Line 13d Other Deductions

It is further determined that Other Deductions for Salaries and Wages for the taxable year ended December 31, 2005 are in the amount of $62,400, rather than $89,820, as indicated on an amended Form 1065 for that tax year. Furthermore, you have not established that any amounts, in excess of the corrected amounts, represent ordinary and necessary business expenses, were paid, or if paid, were paid for the purposes designated. Accordingly, your Other Deductions are decreased in the amount of $27,420 for the taxable years ended December 31, 2005.

It is further determined that your Other Deductions for the taxable year ended December 31, 2007 are understated in the amount of $100,146 due to your unreported distributive share of such deductions for the following partnerships:

Source	Amount
Flag Venture Partners III, LP	$ 80,801
OCM Opportunities Fund VI, LP	10,385
OZ Domestic Partners, LP	715
The Raptor Global Fund, LP	8,245
Total	100,146

Form 1065 Schedule K Line 5 Interest Income

It is further determined that you received unreported interest income, as shown below:

Tax Year Ended December 31, 2005

Source	Amount
Kolter City Plaza II, Inc.	$1,050,000
Tousa/Kolter Holdings, LLC	61,948
Total	$1,111,948

Tax Year Ended December 31, 2007

Source	Amount
OCM Opportunities Fund VI, LP	$ 42,099
Flag Venture Partners III, LP	21,021
The Raptor Global Fund, LP	6,482
Total	$ 69,602

Form 886-A (Rev. January 1994)	Explanations of Items	Schedule No. or Exhibit
Name of Taxpayer	Tax Identification Number	Year/Period Ended
DYNAMO HOLDINGS LIMITED PARTNERSHIP	[redacted]	2005, 2006, 2007

Form 1065, Schedule K, Line 19(a) and 19(b) Distributions

It is determined that you made distributions of money, marketable securities and/or property during the taxable year ended December 31, 2007. The distributions are as follows:

Partner	Amount of Distribution
The 2005 Robert Julien Family Delaware Dynasty Trust	***$146,666,667***
The 2005 Christine Mooa Family Delaware Dynasty Trust	***$220,000,000***

It is further determined that, for the taxable year ended December 31, 2007, your distributive shares of distributions of cash and marketable securities are in the amounts below with respect to interests in the following partnerships:

Partnerships	Amounts
OZ Domestic Partners, LP	$3,000,000
Flag Venture Partners, LP	863,409

Contributions Deductions (2005)

It is further determined that you are entitled to an additional deduction for cash contributions in the amount of $1,250 based on your distributive share of such item with respect to your interest in Tousa/Kolter Holdings, LLC for the taxable year ended December 31, 2005.

Post-1986 Depreciation Adjustment (2005)

It is further determined that your Post-1986 Depreciation Adjustment is $46,676, rather than $48,583 as claimed on your original income tax return for the taxable year ended December 31, 2005, based on an amended Form 1065 for that tax year.

Ordinary Dividends, Form 1065, Schedule K, Line 6a (2007)

It is further determined that your income from ordinary dividends is understated by $27,881 for the taxable year ended December 31, 2007 due to your unreported distributive share of ordinary dividend income for the following partnerships:

Source	Amount
Flag Venture Partners III, LP	$ 21,812
OCM Opportunities Fund VI, LP	3,573
The Raptor Global Fund, LP	2,496
Total	$ 27,881

Form 886-A (Rev. January 1994)	Explanations of Items	Schedule No. or Exhibit
Name of Taxpayer	Tax Identification Number	Year/Period Ended
DYNAMO HOLDINGS LIMITED PARTNERSHIP	[redacted]	2005, 2006, 2007

Qualified Dividends, Form 1065, Schedule K, Line 6b (2007)

It is further determined that your income from qualified dividends is understated by $13,021 for the taxable year ended December 31, 2007 due to your unreported distributive share of qualified dividend income for the following partnerships:

Source	Amount
Flag Venture Partners III, LP	$ 7,039
OCM Opportunities Fund VI, LP	3,564
The Raptor Global Fund, LP	2,418
Total	$ 13,021

Royalties, Form 1065, Schedule K, Line 7 (2007)

It is further determined that your income from royalties is understated by $99 for the taxable year ended December 31, 2007 due to your unreported distributive share of royalty income for the following partnership:

Source	Amount
OCM Opportunities Fund VI, LP	$ 99

Net Short-term Capital Gain, Schedule K, Line 8 (2007)

It is further determined that your net short-term capital gain is understated by $58,985 for the taxable year ended December 31, 2007 due to your unreported distributive share of net short-term capital gain for the following partnerships:

Source	Amount
Flag Venture Partners III, LP	$ 2,517
OCM Opportunities Fund VI, LP	22,095
The Raptor Global Fund, LP	34,373
Total	$ 58,985

Form 886-A (Rev. January 1994)	Explanations of Items	Schedule No. or Exhibit
Name of Taxpayer	Tax Identification Number	Year/Period Ended
DYNAMO HOLDINGS LIMITED PARTNERSHIP	[redacted]	2005, 2006, 2007

Net Long-Term Capital Gain, Schedule K, Line 9a (2007)

It is further determined that your net long-term capital gain is understated by $290,317 for the taxable year ended December 31, 2007 due to your unreported distributive share of net long-term capital gain for the following partnerships:

Source	Amount
Flag Venture Partners III, LP	$244,876
OCM Opportunities Fund VI, LP	29,771
The Raptor Global Fund, LP	15,670
Total	$290,317

Other Loss, Schedule K, Line 11 (2007)

It is further determined that your other loss is overstated by $1,603,264 for the taxable year ended December 31, 2007 due to your unreported distributive share of other income (loss) for the following partnerships:

Source	Item	Amount
Flag Venture Partners III, LP	Portfolio Income	1,909
Flag Venture Partners III, LP	Other Loss	(2,247)
OCM Opportunities Fund VI, LP	Portfolio Income	1,520
OCM Opportunities Fund VI, LP	Sec. 1256 Contracts & Straddles	(13,508)
OCM Opportunities Fund VI, LP	Other Income	1,420
OZ Domestic Partners, LP	Sec. 1256 Contracts & Straddles	(30,092)
OZ Domestic Partners, LP	Other Income	1,232,477
The Raptor Global Fund, L.P.	Other Income	(642)
The Raptor Global Fund, L.P.	Sec. 1256 Contracts & Straddles	(31,596)
The Raptor Global Fund, L.P.	Other Income	444,023
Total		**1,603,264**

Form 886-A (Rev. January 1994)	Explanations of Items	Schedule No. or Exhibit
Name of Taxpayer	Tax Identification Number	Year/Period Ended
DYNAMO HOLDINGS LIMITED PARTNERSHIP	[redacted]	2005, 2006, 2007

Gross Income from All Sources, Form 1065, Schedule K, Line 16b (2007)

It is further determined that your gross income from all sources is understated by $2,247,405 for the taxable year ended December 31, 2007 due to your unreported distributive share of gross income from all sources for the following partnerships:

Source	Amount
Flag Venture Partners III, LP	$ 428,199
OZ Domestic Partners, LP	1,223,923
The Raptor Global Fund, LP	595,283
Total	$2,247,405

Gross Income Sourced at Partner Level, Form 1065, Schedule K, Line 16c (2007)

It is further determined that your gross income from all sources is understated by $1,719,349 for the taxable year ended December 31, 2007 due to your unreported distributive share of gross income sourced at partner level for the following partnerships:

Source	Amount
Flag Venture Partners III, LP	$ 383,456
OZ Domestic Partners, LP	853,983
The Raptor Global Fund, LP	481,910
Total	$1,719,349

Passive Category Foreign Source Income, Form 1065, Schedule K, Line 16d (2007)

It is further determined that your passive category foreign source income is understated by $182,396 for the taxable year ended December 31, 2007 due to your unreported distributive share of passive category foreign source income for the following partnerships:

Source	Amount
Flag Venture Partners III, LP	$ 11,112
OZ Domestic Partners, LP	137,652
OCM Opportunities Fund VI, LP	6,232
The Raptor Global Fund, LP	27,400
Total	$ 182,396

General Category Foreign Source Income, Form 1065, Schedule K, Line 16e (2007)

It is further determined that your passive category foreign source income is understated by $64 for the taxable year ended December 31, 2007 due to your unreported distributive share of general category foreign source income for the following partnership:

Source	Amount
OCM Opportunities Fund VI, LP	$64

Foreign Source Income – Other, Form 1065, Schedule K, Line 16f (2007)

It is further determined that your foreign source income – Other is understated by $3 for the taxable year ended December 31, 2007 due to your unreported distributive share of other foreign source income for the following partnership:

Source	Amount
OZ Domestic Partners, L.P.	$3

Interest Expense Allocated and Apportioned at Partner Level, Form 1065, Schedule K, Line 16g (2007)

It is further determined that your deductions for interest expense (allocated and apportioned at partner level) are understated by $299,187 for the taxable year ended December 31, 2007 due to your unreported distributive share of such interest expense for the following partnerships:

Source	Amount
Flag Venture Partners III, LP	$183
OZ Domestic Partners, LP	204,901
The Raptor Global Fund, LP	94,123
Total	$299,187

Other Deductions Required to be Allocated at the Partner Level, Form 1065, Line 16h (2007)

It is further determined that your other deductions (allocated and apportioned at partner level) are understated by $135,591 for the taxable year ended December 31, 2007 due to your unreported distributive share of such deductions for the following partnerships:

Source	Amount
Flag Venture Partners III, LP	$ 135,401
The Raptor Global Fund, LP	190
Total	$ 135,591

Form 886-A (Rev. January 1994)	Explanations of Items	Schedule No. or Exhibit
Name of Taxpayer	Tax Identification Number	Year/Period Ended
DYNAMO HOLDINGS LIMITED PARTNERSHIP	[redacted]	2005, 2006, 2007

Deductions Allocated and Apportioned at Partnership Level to Foreign Source Income – Passive Category, Form 1065, Line 16l (2007)

It is further determined that your deductions allocated and apportioned at the partnership level to foreign source income – passive category, are understated by $30,311 for the taxable year ended December 31, 2007 due to your unreported distributive share of such deductions for the following partnerships:

Source	Amount
Flag Venture Partners III, LP	$ 20,068
OCM Opportunities Fund VI, LP	648
OZ Domestic Partners, LP	8,261
The Raptor Global Fund, LP	1,334
Total	$ 30,311

Other Deductions Allocated and Apportioned at Partnership Level to Foreign Source Income, Form 1065, Line 16k (2007)

It is further determined that your other deductions allocated and apportioned at the partnership level to foreign source income are understated by $1 for the taxable year ended December 31, 2007 due to your unreported distributive share of such deduction for the following partnership:

Source	Amount
OZ Domestic Partners, LP	$1

Total Foreign Taxes Paid or Accrued, Form 1065, Line 16l, (2007)

It is further determined that total foreign taxes paid or accrued are understated by $6,749 for the taxable year ended December 31, 2007 due to your unreported distributive share of such item for the following partnerships:

Source	Amount
Flag Venture Partners III, LP	$ 1 (accrued)
OCM Opportunities Fund VI, LP	253 (paid)
OZ Domestic Partners, LP	2,404 (paid)
The Raptor Global Fund, LP	4,091 (paid)
Total	$ 6,749

Form 886-A (Rev. January 1994)	Explanations of Items	Schedule No. or Exhibit
Name of Taxpayer	Tax Identification Number	Year/Period Ended
DYNAMO HOLDINGS LIMITED PARTNERSHIP	[redacted]	2005, 2006, 2007

Nondeductible Expenses, Form 1065, Line 18c (2007)

It is further determined that nondeductible expenses paid or incurred by the partnership are understated by $14 for the taxable year ended December 31, 2007 due to your unreported distributive share of such item for the following partnerships:

Source	Amount
Flag Venture Partners III, LP	$ 11
OCM Opportunities Fund VI, LP	3
Total	$ 14

Investment Income, Form 1065, Schedule K, Line 20a (2005 and 2007)

It is further determined that you received unreported investment income for the taxable year ended December 31, 2005, as shown below:

Source	Amount
Kolter City Plaza II, Inc.	$1,050,000
Tousa/Kolter Holdings, LLC	61,948
Total	$1,111,948

It is further determined that your investment income is understated by $100,369 for the taxable year ended December 31, 2007 due to your unreported distributive share of investment income for the following partnerships:

Source	Amount
Flag Venture Partners III, LP	$ 44,742
OCM Opportunities Fund VI, LP	47,291
The Raptor Global Fund, LP	8,336
Total	$100,369

Investment Expenses, Form 1065, Schedule K, Line 20b (2005 and 2007)

It is further determined that your deduction for investment expenses is in the amount of $62,400, rather than $89,820 as claimed on your original income tax return for the taxable year ended December 31, 2005, as reported on an amended Form 1065 for that year. Accordingly, your deduction for investment expenses is disallowed in the amount of $27,420.

It is further determined that you are entitled to additional deductions for investment expenses in the amount of $99,788 for the taxable year ended December 31, 2007 due to your unreported distributive share of investment expenses for the following partnerships:

Source	Amount
Flag Venture Partners III, LP	$ 80,801
OCM Opportunities Fund VI, LP	10,027
OZ Domestic Partners, LP	715
The Raptor Global Fund, LP	8,245
Total	$ 99,788

Unrelated Business Taxable Income, Form 1065, Schedule K, Line 20c (2007),

It is further determined that your unrelated business taxable income is understated in the amount of $218,485 for the taxable year ended December 31, 2007 due to your unreported distributive share of such income for the following partnerships:

Source	Amount
Flag Venture Partners III, LP	$ 31
The Raptor Global Fund, LP	218,454
Total	$218,485

Accuracy-Related Penalty – Section 6662(a) (2005, 2006 , and 2007)

It is further determined that the accuracy-related penalty under I.R.C. §6662 applies to all underpayments of tax attributable to adjustments of partnership items determined herein, as follows:

a. a 20 percent penalty is imposed due to negligence or disregard of rules and regulations as provided by I.R.C. §§ 6662(a), 6662(b)(1), and 6662(c).

b. a 20 percent penalty is imposed due the substantial understatement of income tax as provided by I.R.C. §§ 6662(a), 6662(b)(2), and 6662(d).

Form 886-A (Rev. January 1994)	Explanations of Items	Schedule No. or Exhibit
Name of Taxpayer	Tax Identification Number	Year/Period Ended
DYNAMO HOLDINGS LIMITED PARTNERSHIP	[redacted]	2005, 2006, 2007

FOR INFORMATIONAL PURPOSES ONLY

"During the TEFRA unified proceeding, it was determined that the partnership has cancellation of debt income. Cancellation of debt income is a separately stated item of income passed through to you as a partner. The inclusion in or exclusion from taxable income of the cancellation of debt income is determined at the partner level. Adjustments due to cancellation of debt income are affected items which will be proposed to each partner upon the completion of the TEFRA unified proceedings."

FPAA

Form 870-PT (Rev. 6-2008) For partnership taxable years ending after August 5, 1997	Department of the Treasury — Internal Revenue Service **Agreement for Partnership Items and Partnership Level Determinations as to Penalties, Additions to Tax, and Additional Amounts**	IN REPLY REFER TO: E:SBSE:TS:TEFRA MIDWEST

Taxpayer(s) name(s), address and zip code:	Name of Partnership:	Tax Year(s) Ended:
Tax Matters Partner Dynamo Holdings Limited Partnership 701 South Olive Avenue, Apt. 104 West Palm Beach, FL 33401	Dynamo Holdings Limited Partnership EIN: [redacted]	12/31/2005 12/31/2006 12/31/2007
TIN:	Name of Tax Matters Partner: Dynamo GP, Inc	

Offer of Agreement to Partnership Items and Partnership Level Determinations as to Penalties, Additions to Tax, and Additional Amounts & Waiver of Restrictions on Assessment for Partnership Items, Penalties, Additions to Tax, and Additional Amounts

Under the provisions of sections 6224(c) and 7121 of the Internal Revenue Code (IRC), the Commissioner of the Internal Revenue Service and the undersigned taxpayer(s) agree to the determination of partnership items and partnership level determinations as to penalties, additions to tax, and additional amounts that relate to adjustments to partnership items as shown on the attached Schedule of Adjustments.

The undersigned taxpayer(s), in accordance with IRC sections 6224(b) and 6213(d), also waive(s) the restrictions provided by IRC sections 6225(a) and 6213(a) and consent(s) to the assessment and collection of any deficiency attributable to partnership items, penalties, additions to tax, and additional amounts that relate to partnership items, as set forth in the attached Schedule of Adjustments (plus any interest provided by law). IRC Section 6651 late filing penalty applies to any late filed (or non-filed) returns that are required to report the partnership item adjustments.

This agreement is conditional and will not become effective or final until this agreement form is returned to the Commissioner and is signed on his or her behalf. The one-year extension of the period of limitations on assessments under IRC section 6229(f) will not begin to run until the date the Commissioner's representative signs this form on the Commissioner's behalf. If this is a partial agreement, the period of limitations for assessing any tax attributable to the settled items shall be determined as if this agreement had not been entered into.

If this part of this agreement form is signed for the Commissioner, the treatment of partnership items and partnership level determinations as to penalties, additions to tax and additional amounts that relate to adjustments to partnership items under this agreement will not be reopened in the absence of fraud, malfeasance, or misrepresentation of fact. In addition, no claim for an adjustment of partnership items, refund or credit based on any change in the treatment of partnership items or partnership level determinations as to penalties, additions to tax, and additional amounts may be filed or prosecuted.

Once the taxpayer signs such a waiver and it is countersigned by the Commissioner, the taxpayer cannot file an Administrative Adjustment Request (AAR) on any partnership items for the related TEFRA entity. This includes partnership items not specifically addressed on the attached Schedule of Adjustments.

Signature of Taxpayer	Date Signed	Phone Number
Signature of Taxpayer	Date Signed	Phone Number
By (Signature and Title)	Date Signed	Phone Number

FOR INTERNAL REVENUE USE ONLY	Date accepted for Commissioner	Signature
	Office	Title

FPAA

Department of the Treasury — Internal Revenue Service

Agreement for Partnership Items and Partnership Level Determinations as to Penalties, Additions to Tax, and Additional Amounts

SCHEDULE OF ADJUSTMENTS

NAME OF PARTNERSHIP Dynamo Holdings Limited Partnership EIN [redacted]	TAX YEAR(S) ENDED 12/31/2005	12/31/2006	12/31/2007
DETAIL OF ADJUSTMENTS TO ORDINARY INCOME			
1.a. Gross Receipts	238,316		
1.b. Ordinary loss from other Partnerships, Estates and Trusts	(5,390,013)		(71)
1.c. Depreciation	7,982		
1.d. Other deductions	2,081,466		
1.e. Cost of goods sold		5,234,634	5,818,210
1.f. Interest Expense		8,185,666	-0-
1.g. Other Deductions Line 20 (Airplane Expense)		42,057	25,791
TOTAL ADJUSTMENTS TO ORDINARY INCOME	(3,064,249)	13,462,357	5,843,930
OTHER ADJUSTMENTS	[redacted]		
A. F 1065, Sch K Line 2 Net Rental Inc/(loss) Form 8825			
(1) ADJUSTMENT	610,212	(448,351)	(493,893)
(2) AS REPORTED	(892,979)	(3,065,670)	(711,636)
(3) CORRECTED	(82,767)	(3,514,021)	(1,205,529)
B. Form 1065 Sch K Line 13b Investment Interest Expense	[redacted]		
(1) ADJUSTMENT	8,650	17,421,674	16,921,256
(2) AS REPORTED	709,554	19,656,535	18,956,932
(3) CORRECTED	700,904	2,234,861	2,035,676

REMARKS

See next page for more "Other adjustments" and Balance Sheet Changes

The accuracy-related penalties under I.R.C. section 6662(a) are applicable to all underpayments of tax attributable to adjustments of partnership items determined herein.

The attached Explanation of Adjustments is hereby incorporated by reference in this Form 4605-A and FPAA. Any adjustments not shown on this Form 4605-A but contained in the attached Explanation of Adjustments are hereby incorporated into this Form 4605-A and FPAA

Form 870-PT, Other Adjustments (Continued)

NAME OF PARTNERSHIP Dynamo Holdings Limited Partnership EIN [redacted]	TAX YEAR(S) ENDED 12/31/2005	12/31/2006	12/31/2007
C. F 1065, Schedule L Line 17, Other Current Liabilities (Ending)			
(1) ADJUSTMENT			(138,014,172)
(2) AS REPORTED			138,497,411
(3) CORRECTED			483,239
D. Schedule L, Line 20, Other Liabilities (Ending)			
(1) ADJUSTMENT	(357,949,054)	(740,307,482)	(109,042,836)
(2) AS REPORTED	498,151,841	827,958,127	296,621,403
(3) CORRECTED	140,202,787	87,650,645	187,578,567
E. Form 1065 Schedule K Line 5 Interest Income			
(1) ADJUSTMENT	1,111,948		69,602
(2) AS REPORTED	25,491		19,785,742
(3) CORRECTED	1,137,439		19,855,344
F. Form 1065 Discharge of Debt Income			
(1) ADJUSTMENT			754,851,075
(2) AS REPORTED			0
(3) CORRECTED			754,851,075
G. Distributions of Cash, Marketable Securities, and/or Other Property			
(1) ADJUSTMENT			370,330,076
(2) AS REPORTED			0
(3) CORRECTED			370,330,076
H. Schedule L, Line 20, Other Liabilities (Beginning)			
(1) ADJUSTMENT		(357,949,054)	(740,307,482)
(2) AS REPORTED		498,151,841	827,958,127
(3) CORRECTED		140,202,787	87,650,645
I. Schedule K, Line 13d. Other Deductions			
(1) ADJUSTMENT	(27,420)	0	100,146
(2) AS REPORTED	89,820	1,804,701	1,417,248
(3) CORRECTED	62,400	1,804,701	1,517,394

See attachments to 870-PT for Other Adjustments

Form 870-PT Attachment for
Dynamo Holdings Limited Partnership
[redacted]
TYE 12/31/2005
Other Adjustment Lines

Sch K Line No.s	Partners' Distributive Share Items	AS REPORTED	CORRECTED	ADJUSTMENT
13a	CONTRIBUTIONS	0	1,250	1,250
17a	POST 1986 DEPRECIATION ADJUSTMENT	48,583	46,676	(1,907)
20a	INVESTMENT INCOME	5,236,806	6,348,754	1,111,948
20b	INVESTMENT EXPENSES	89,820	62,400	(27,420)

Form 870-PT Attachment for
Dynamo Holdings Limited Partnership
[redacted]
TYE 12/31/2007
Other Adjustment Lines

Sch K Line No.s	Item	AS REPORTED	CORRECTED	ADJUSTMENT
6a	ORDINARY DIVIDENDS	2,797,764	2,825,645	27,881
6b	QUALIFIED DIVIDENDS	1,735,717	1,748,738	13,021
7	ROYALTIES	49	148	99
8	NET ST CAPITAL GAIN	11,029,500	11,088,485	58,985
9a	NET LT CAPITAL GAIN	14,842,471	15,132,788	290,317
11	OTHER INCOME	(1,844,536)	(241,272)	1,603,264
16b	GROSS INCOME FROM ALL SOURCES	22,431,089	24,678,494	2,247,405
16c	GROSS INCOME SOURCED AT PARTNER LEVEL	18,902,931	20,622,280	1,719,349
16d	PASSIVE	1,441,516	1,623,912	182,396
16e	GENERAL CATEGORY FOREIGN SOURCE INCOME	47,759	47,823	64
16f	FOREIGN SOURCE INCOME - OTHER	10,010	10,013	3
16g	INTEREST EXPENSE	946,416	1,245,603	299,187
16h	OTHER DEDUCTIONS	11,480,302	11,615,893	135,591
16i	PASSIVE	199,469	229,780	30,311
16k	OTHER	9,129	9,130	1
16l	TOTAL FOREIGN TAXES	113,039	119,788	6,749
18c	NONDEDUCTIBLE EXPENSES	35,151	35,165	14
20a	INVESTMENT INCOME	22,040,880	22,141,249	100,369
20b	INVESTMENT EXPENSES	774,296	874,084	99,788
20v	UNRELATED BUSINESS TAXABLE INCOME	0	218,485	218,485

INSTRUCTIONS FOR SIGNING FORM 870-PT

1. Sign the agreement if you wish to agree to the partnership items and *partnership level determinations as to penalties, additions to tax, and additional amounts*, as shown on the attached Schedule of Adjustments. The execution and filing of this offer will expedite the adjustment of tax liability.

2. If a JOINT RETURN OF A HUSBAND AND WIFE was filed and both spouses intend to agree, both spouses should sign Form 870-PT. One spouse may sign as agent for the other if acting under a power of attorney, which, if not previously filed, must accompany this form. The IRS may accept the signature of only one spouse at its discretion. However, the agreement will only be binding on the signing spouse.

3. If the taxpayer is a corporation, the agreement should be signed with the corporate name followed by the signature and title of the officer authorized to sign Form 870-PT.

4. Your attorney or agent may sign for you if this action is specifically authorized by a power of attorney, which if not previously filed, must accompany this form.

5. If this offer is signed by a trust, the agreement must be signed with the trust name, followed by the signature and title of the person authorized to sign on behalf of the trust.

6. For a partner who is a subsidiary corporation in a consolidated group:

   - If the agreement is for a partnership year(s) ending on or before the last day of a consolidated return year beginning before June 28, 2002, the agreement should be signed by a currently authorized officer of the corporation who was the common parent corporation of the consolidated group for the relevant consolidated return year(s). The common parent corporation signs the agreement in its own name. The signature and title of a current officer of the common parent corporation, who is authorized to bind the common parent corporation, should be displayed in the signature block. See Treas. Reg. § 1.1502-77A(a).

   - If the agreement is for a partnership year(s) ending on or before the last day of a consolidated return year beginning on or after June 28, 2002, then a currently authorized officer of the subsidiary corporation should sign the agreement and should do so in the name of the subsidiary corporation. See Treas. Reg. § 1.1502-77(a)(6)(iii). The signature and title of a current officer of the subsidiary corporation, who is authorized to bind the corporation, should be displayed in the signature block. The agreement should also be signed by a currently authorized officer of the corporation who was the common parent corporation of the consolidated group for the relevant consolidated return year(s). The signature and title of a current officer of the common parent corporation, who is authorized to bind the common parent corporation, should also be displayed in the signature block.

7. For a partner who is the common parent corporation of a consolidated group, a currently authorized officer of the corporation who was the common parent corporation of the consolidated group for such consolidated return year(s) should sign the agreement in the name of the common parent corporation. See Treas. Reg. § 1.1502-77(a).

8. If the Tax Matters Partner signs this offer, please include the title with the signature.

9. If the Tax Matters Partner is a subsidiary corporation in a consolidated group:

   - If the agreement is for a partnership year(s) ending on or before the last day of a consolidated return year beginning before June 28, 2002, then a currently authorized officer of the corporation who was the common parent corporation of the consolidated group for such consolidated return year should sign the agreement on behalf of the Tax Matters Partner. The signature and title of a current officer of the common parent corporation, who is authorized to bind the common parent corporation, should be displayed in the signature block. See Treas. Reg. § 1.1502-77A(a). An authorized officer for the subsidiary corporation should also sign if it, as the Tax Matters Partner, is binding non-notice partners under the agreement. The signature and title of a current officer of the subsidiary corporation, who is authorized to bind the corporation, should be displayed in the signature block.

   - If the agreement is for a partnership year(s) ending on or before the last day of a consolidated return year beginning on or after June 28, 2002, then a currently authorized officer of the subsidiary corporation should sign the agreement in the name of the subsidiary corporation. See Treas. Reg. § 1.1502-77(a)(3)(v). The agreement should also be signed by a currently authorized officer of the corporation who was the common parent corporation of the consolidated group for the relevant consolidated return year(s). The signature and title of a current officer of the common parent corporation, who is authorized to bind the common parent corporation, should also be displayed in the signature block.

NOTE: The submission of this offer by you and the acceptance of the offer for the Commissioner may result in an additional tax liability to you plus interest as provided by law. If the result is a decrease in tax, the amount of the decrease will be sent to you with interest as provided by law.

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 11-mc-80456-RYSKAMP/VITUNAC

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF BEEKMAN VISTA, INC., RESPONDENT

DECLARATION OF MICHAEL CLARKE IN SUPPORT OF RESPONSE OF MICHAEL CLARKE AS CHIEF FINANCIAL OFFICER OF BEEKMAN VISTA, INC., TO PETITION TO ENFORCE INTERNAL REVENUE SUMMONS WITH RETURN DATE OCTOBER 25, 2010

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1. My name is Michael Clarke. I am the Chief Financial Officer of Beekman Vista, Inc. and Chief Financial Officer of Dynamo GP Inc. as General Partner of Dynamo Holding Limited Partnership ("Dynamo GP"). I am over twenty-one (21) years of age and I am of sound mind. The matters set forth in this Declaration are set forth of my personal knowledge.

2. The Government completed its examination in respect of the issues raised with respect to debt and interest concerning the tax returns of Dynamo Holdings Limited Partnership ("DHLP") for the years end-

ed December 31, 2005, 2006 and 2007 on December 28, 2010 when it issued its Final Partnership Administration Adjustment ("FPAA").

3. On February 1, 2011, DHLP filed in the United States Tax Court a "Petition for Readjustment of Partnership Items Under Code Section 6226" challenging the conclusions reached by the Government in the FPAA, including the issues relating to the debt and interest that the Government claims justifies the enforcement of the summons at issue here. There is currently active litigation between DHLP and the Government in the Tax Court concerning these issues and others.

4. This enforcement proceeding was commenced on April 28, 2011.

5. Before the issuance of the instant summons, DHLP and all of the other persons summoned or requested to provide information about DHLP, including Beekman Vista, Inc. (hereinafter "Beekman"), through their counsel, proceeding informally for more than a year before the summons was issued, provided Ms. Fierfelder and the Government with all of the information needed by them to analyze the "tax reporting obligations of DHLP" and to finalize and issue the FPAA.

6. As the CFO of Beekman and Dynamo GP, I was involved in gathering and providing all information requested of Beekman and Dynamo GP and their of-

ficers and was, in fact, interviewed by an agent other than Ms. Fierfelder. Substantial parts of what is presently requested were previously provided in responding to the earlier inquiries.

7. All documents in my possession, custody or control necessary for the Government to conduct its examination of DHLP's tax returns in respect of the identified issues were shared with the Government and they should have them.

8. Beekman is resisting IRS letters issued to Beekman covering these same issues and same years because Beekman has already been examined on withholding issues for the same years and has settled with the Government and paid a liability, including interest, of $28,058,754.00.

9. In 2010, after DHLP had twice agreed to toll applicable statutes of limitation, the Government asked DHLP to agree to yet another extension of the tolling agreement. DHLP refused to grant another extension and, immediately thereafter, despite having not asked for additional information for some time, the Government suddenly issued the instant summons.

10. Despite the impending December 31, 2010 deadline for the Government to take action, the Government made no effort to enforce the instant summons and instead went forward and issued the FPAA.

11. Upon information and belief, the Government at the time the summons was issued advised counsel

for DHLP that once the FPAA was filed and a Tax Court Petition filed, such summonses would not be enforced. Thereafter, the FPAA was issued, the Tax Court Petition was filed and the Government answered. It was only after the Government answered the Tax Court Petition that the Government sought to enforce the summonses.

Pursuant to 28 U.S.C. § 1764, I declare under penalty of perjury that I have read the foregoing and the facts stated in it are true and correct.

Dated: July 18, 2011

/s/ MICHAEL CLARKE
MICHAEL CLARKE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 11-mc-80456-RYSKAMP/VITUNAC

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF BEEKMAN VISTA, INC., RESPONDENT

DECLARATION OF RICHARD SAPINSKI, ESQ.

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1. My name is Richard Sapinski. I am a member of the law firm of Sills, Cummis & Gross, P.C. I am admitted to the bar of the State of New Jersey and the U.S. Tax Court and am in good standing. The matters set forth in this Declaration are set forth of my personal knowledge.

2. During the summer of 2011, I was engaged to represent Christine Moog in connection with proceedings initiated by the Internal Revenue Service in the United States District Court for the Southern District of New York to enforce an Internal Revenue Service Summons issued to her in late 2010 by Revenue Agent Mary Fierfelder of the Miami, Florida IRS Examination Division office.

3. At the start of my representation of Ms. Moog, I was provided with a copy of the IRS Summons and a

Declaration filed by Revenue Agent Fierfelder in support of the Petition to Enforce the Summons. In those documents Ms. Fierfelder represents that she is conducting an Examination of the 2005, 2006 and 2007 partnership income tax returns of Dynamo Holdings Limited Partnership and that she sought information from Ms. Moog necessary to complete that examination.

4. Upon being engaged to represent Ms. Moog, I contacted Mara Trager, the Assistant U.S. Attorney in the Southern District of New York who had filed the Summons enforcement action to arrange a date and time for Ms. Moog to appear before Revenue Agent Fierfelder in order to comply with the Summons.

5. AUSA Trager advised me that she would have to contact the IRS and arrange a date for Ms. Moog's appearance with IRS. I provided AUSA Trager with several dates in mid-September 2011 when both I and Ms. Moog were available.

6. In early September AUSA Trager advised me that the IRS wished to schedule Ms. Moog's appearance at the IRS Chief Counsel's office in Manhattan on September 13, 2011 and that I should contact either David Flassing, Esq. or Lisa Goldberg, Esq. of the Chief Counsel's office to discuss a starting time. I subsequently contacted Mr. Flassing and made arrangements to appear.

7. On September 13, 2011 I accompanied Ms. Moog to the IRS Chief Counsel's office at 33 Maiden Lane,

New York, New York and upon arrival we were met by IRS Special Trial Attorney David Flassing who introduced himself and told us he would be conducting Ms. Moog's examination.

8. We were escorted to a conference room where Lisa Goldberg and the Revenue Agent from the Manhattan IRS office who had served the Summons on Ms. Moog were waiting along with a Court Reporter.

9. Prior to the meeting, I had a telephone call to Mr. Flassing to confirm the time for Ms. Moog's appearance. I inquired if IRS intended to ask Ms. Moog about any documents and, if so, whether he would be willing to provide me with copies in advance so I could review them with Ms. Moog and expedite the testimony process. Mr. Flassing advised me that he had not yet determined what, if any, documents he might ask about.

10. Upon being seated, Mr. Flassing provided Ms. Moog and me with identical white three-ring binders which contained approximately 45 exhibits separated by numbered tabs. Mr. Flassing said he would be asking Ms. Moog about these documents. My review of the binder revealed that it contained a number of pages from Ms. Moog's personal tax returns for various years, as well a pages from Trust documents and other Taxpayers' returns besides what were represented to be excerpts from various tax returns of Dynamo Holdings Limited Partnership ("Dynamo").

11. Revenue Agent Fierfelder was not present. The local IRS agent who was present did not participate in any of the questioning and sat at the other end of the conference table looking at a laptop computer. From what I observed, he was not consulted by Mr. Flassing or Ms. Goldberg and appeared totally uninterested and uninvolved in the proceedings.

12. On several occasions I had to object to Mr. Flassing's questions to the extent they did not appear in any way related to the tax liability of Dynamo for the years 2005 through 2007 and appeared to be more in the nature of discovery about the personal finances of Ms. Moog and her family. Although I asked Mr. Flassing to explain how such information was relevant to the Summons, he declined to do so and went on to other topics.

13. After approximately two and one-half hours of questioning, Mr. Flassing indicated he had no further questions. He did not ask the IRS agent if he had any questions or consult with him before declaring the proceedings concluded.

14. Under penalty of perjury, pursuant to 28 U.S.C. § 1746, I declare all of the foregoing is true and correct.

/s/ RICHARD J. SAPINSKI
RICHARD J. SAPINSKI

Executed on: Oct. [19], 2011

[SEAL OMITTED]

DEPARTMENT OF THE TREASURY

INTERNAL REVENUE SERVICE
OFFICE OF CHIEF COUNSEL
LARGE BUSINESS & INTERNATIONAL DIVISION
200 WEST ADAMS STREET
SUITE 2400
CHICAGO, ILLINOIS 60606
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July 18, 2011

CC:LBI:RFPH:SLCHI:DBFlassing
TL-2685-11

Via Private Delivery Service

Martin R. Press, Esq.
Gunster, Yoakley & Stewart
450 E. Las Olas Blvd.
Suite 1400
Ft. Lauderdale, FL 33301

In re: Dynamo Holdings Limited Partnership, Dynamo GP, Inc., Tax Matters Partner v. Commissioner, Docket No. 2685-11

Dear Martin:

I write you in reply to your two faxes dated July 14, 2011, and the voicemail you left on that date. Re-

garding your inquiry concerning referral of the above case to Appeals, respondent does not consent. As your inquiry notes, Counsel may transfer a case to Appeals when there is a "strong likelihood of settlement". I.R.M. 8.4.1.4(1). Respondent does not know whether the case has a strong likelihood of settlement because respondent does not have the complete facts of the case. As you are aware, six summonses issued during the exam of Dynamo Holdings Limited Partner ("DHLP") were not responded to and are now the subjects of enforcement proceedings currently underway in two Federal district courts. In addition, petitioner has not responded to respondent's discovery requests in this case. Respondent does not believe that it would serve the interests of justice to send Appeals a case that is not fully factually developed.

Regarding our conversation on May 16, 2011, I noted during it that there were multiple adjustments in the Final Partnership Administrative Adjustment ("FPAA") that were consistent with an amended return DHLP submitted to the Internal Revenue Service. I also noted that the FPAA contained other items to which DHLP had agreed at audit. I inquired whether petitioner intended to contest these adjustments, as the parties would not need to undertake discovery on them if petitioner did not. You indicated to me that petitioner may be willing to concede certain adjustments in exchange for concession of the related penalties. Please feel free to inform me of any adjustments for which this is the case.

Finally, regarding use of email in this case, respondent is as a practical matter prohibited from sending emails. I am not aware of any prohibition on petitioner sending emails. However, the security protecting respondent's email system limits respondent's receipt of email. Our information technology personnel inform me that our system will not accept emails greater than 5 megabytes from outside our system, and that there is a filter designed to block any email containing personally identifiable information, such as names, addresses and social security numbers. Moreover, our system will not notify a sender that an email has been blocked. Accordingly, the best methods for communication appear to be telephone, fax and overnight delivery.

Should you have any questions regarding the above, please write or call me at (312) 368-8656.

Sincerely,

/s/ DAVID B. FLASSING
DAVID B. FLASSING
Special Trial Attorney (Chicago)
(Large Business & International)

cc: Lisa M. Goldberg
Attorney (Miami)
(Large Business & International)

UNITED STATES TAX COURT

Docket No. 2685-11
Filed Electronically

DYNAMO HOLDINGS LIMITED PARTNERSHIP, DYNAMO GP, INC., TAX MATTERS PARTNER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

[Dated: Oct. 3, 2011]

MOTION FOR CONTINUANCE OF TRIAL

RESPONDENT MOVES, pursuant to the provisions of Tax Court Rule 133, for a continuance of the trial in this case from the trial session commencing on January 30, 2012 in Miami, Florida, but respectfully requests that the present division of the Tax Court retain jurisdiction of the case.

IN SUPPORT THEREOF, respondent respectfully states:

1. Respondent issued a Notice of Final Partnership Administrative Adjustment ("FPAA") on December 28, 2010.

2. Petitioner filed its petition on February 1, 2011.

3. This case was deemed at issue on April 7, 2011 when respondent timely filed an answer.

4. This case was calendared for the first time by this Court at the trial session scheduled to commence on January 30, 2012, in Miami, Florida.

5. The FPAA in this case involves numerous issues and makes over 48 adjustments to partnership items of Dynamo Holdings Limited Partnership ("DHLP"). One of the largest adjustments relates to transfers ("Transfers") to DHLP primarily from Beekman Vista, Inc. ("Beekman") in the amount of $740,307,482 that DHLP reported as giving rise to "Other Liabilities".

6. During the IRS examination that gave rise to the FPAA, the Internal Revenue Service issued six summonses ("Summonses") directed to persons owning and/or exercising control over DHLP and/or Beekman. The recipients of the Summonses did not appear. The Department of Justice initiated six proceedings for their enforcement in the spring of 2011. The Department of Justice is in the process of concluding one of the summons enforcement cases after the summons recipient was interviewed on September 13, 2011. A continuance of this case would allow the Southern District of Florida, where the remaining five summons enforcement cases were filed, to determine whether the summonses at issue in these cases should be enforced:

Case Name	Docket No.
United States v. Michael Clarke, as Chief Financial Officer of Beekman Vista, Inc.	9:11-mc-80456
United States v. Michael Clarke, as Chief Financial Officer of Dynamo GP, Inc., as General Partner of Dynamo Holdings Limited Partnership	9:11-mc-80457
United States v. Rita Holloway	9:11-mc-80459
United States v. Marc Julien	9:11-mc-80460
United States v. Robert Julien	9:11-mc-80461

7. On August 16, 2011, the parties held a Branerton meeting and the petitioner produced a partial reply to respondent's informal discovery. As discussed above, one of the largest adjustments in the FPAA relates to Transfers in the amount of $740,307,482. The petitioner indicated at the Branerton meeting that the documents respondent requested that relate to the Transfers will be voluminous. A continuance in this

case will allow time for petitioner to produce and respondent to review these documents.

8. Moreover, a continuance in this case may allow for the parties to narrow the issues for trial.

9. Petitioner's counsel has informed respondent that he objects to the granting of this motion.

WHEREFORE, respondent requests that this motion be granted.

Date: [Oct. 3, 2011] WILLIAM J. WILKINS
Chief Counsel
Internal Revenue

By: /s/ LISA M. GOLDBERG
LISA M. GOLDBERG
Attorney
(Large Business & International)
Tax Court Bar No. GL0399
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Area Counsel
(Retailers, Food, Pharmaceuticals & Health Care)

WILLIAM G. MERKLE
Associate Area Counsel (SL) (Chicago)
(Large Business & International)

[SEAL OMITTED]

Internal Revenue Manual

Part 25. Special Topics
Chapter 5. Summons Handbook
Section 1. Introduction

25.5.1 Introduction

- 25.5.1.1 Overview
- 25.5.1.2 Provisions of Law
- 25.5.1.3 Authority
- 25.5.1.4 Factors to Consider Before Issuing a Summons
- 25.5.1.5 Description of Summons (Form 2039)
- Exhibit 25.5.1-1 General Instructions For Preparation of a Summons

25.5.1.1 (04-30-1999)
Overview

1. The Summons Handbook provides guidelines for use by Collection, Criminal Investigation, Examination, and Tax Exempt/Government Entities (TE/GE) employees. Specific function directed guidelines are covered where appropriate.

2. This section contains the following topics:

    - Provisions of law
    - Authority
    - Factors to consider

- Description of summons (Form 2039)

25.5.1.2 (10-31-2006)
Provisions of Law

1. The provisions of the law for using and enforcing a summons are contained in the following sections of the Internal Revenue Code:
    A. IRC 7602 Examination of Books and Witnesses
    B. IRC 7603 Service of Summons
    C. IRC 7604 Enforcement of Summons
    D. IRC 7605 Time and Place of Examination
    E. IRC 7609 Special Procedures for Third-Party Summonses
    F. IRC 7610 Fees and Costs for Witnesses
    G. IRC 7612 Special Procedures for Summonses for Computer Software
    H. IRC 7622 Authority to Administer Oaths and Certify
    I. IRC 7402 Jurisdiction of District Courts
    J. IRC 7210 Failure to Obey Summons
    K. IRC 6420(e)(2), 6421(g)(2) and 6427(j)(2)
    L. IRC 6503(j) Designated and Related Summons

25.5.1.3 (10-31-2006)
Authority

1. The Commissioner's authority to take any and all actions related to a summons derives from the Internal Revenue Code sections listed above above in IRM 25.5.1.2 and from Treasury Order No. 150–10. However, the authority of specific IRS officers and employees to issue a summons or take any other action related to a summons is strictly defined and restricted by Deleg. Order No. 4 (as revised), as set forth in IRM 1.2.52.7. Before taking any action relating to a summons, the Service employee should check Deleg. Order No. 4 to insure that he or she has the necessary authority. The following paragraphs describe many of the authorized actions set forth in Deleg. Order No. 4 and list many (but not all) of the IRS officers and employees authorized to take these actions. The purpose of these paragraphs is not to provide an exhaustive description of Deleg. Order No. 4, but rather to identify the actions most commonly associated with summonses and the IRS officers or employees who are authorized to take those actions.

25.5.1.3.1 (10-31-2006)
Authority to Issue "John Doe" Summonses

1. A John Doe summons is one issued to obtain the identity of the taxpayer or group of taxpayers being investigated. They are used only when the proper name of the taxpayer is unknown and

not readily available from other sources. The authority to issue a John Doe summons is strictly limited by Deleg. Order No. 4. Only certain high-ranking executives have the authority to issue a John Doe summons. Those executives include the:

A. Directors of Field Operations for SBSE, LMSB, CL and W&I;

B. Territory Managers for LMSB and SBSE

C. Field Operations Managers and Area Managers for Federal, State and Local Governments functions, and Indian Tribal Governments functions in TEGE.

Note:

Special Agents, revenue agents, and revenue officers do **not** have this authority.

25.5.1.3.2 (10-31-2006)
Authority to Issue Summonses Except "John Doe" Summonses

1. The following IRS officers and employees have the authority to issue any summons other than a John Doe summons:

   A. Special Agents and Special Agents in Charge

   B. Team Managers and Group Managers responsible for Examination, Collection

and /or Compliance, EP/EO and Government Entities matters.

2. These officers and employees also have the authority to serve and enforce summonses, to set the time and place for appearance, to take the summoned person's testimony under oath, to receive and examine data produced in compliance with the summons, and to perform other related duties described in IRC sections 7609(g) and (i)(2).

25.5.1.3.3 (10-31-2006)
Authority to Issue Summonses Requiring Approval (Except "John Doe" Summonses)

1. The following officers and employees have the authority to issue summonses to the taxpayers being investigated. These officers and employees also have the authority to issue summonses to third-party witnesses but only when the employee's manager, or any supervisory official above that level, has given prior approval.

   A. Internal Revenue Agents,

   B. Estate Tax Attorneys,

   C. Estate Tax Examiners,

   D. Revenue Service and Assistant Revenue Service Representatives,

   E. Tax Auditors

   F. Revenue Officers, GS–9 and above,

G. Tax Law Specialists,

H. Compliance Officers,

I. Tax Resolution Representatives,

J. Property Appraisal and Liquidation Specialists GS-12 and above

2. To approve the issuance of a third-party summons, the supervisor must sign the summons as the approving officer. Alternatively, the issuing employee may write and sign a statement on the summons indicating that he or she had prior authorization to issue the summons and identifying the name and title of the approving supervisor and the date of the approval. This statement may be written in any blank space on the front of the original summons and all copies.

3. The officers and employees listed above in IRM 25.5.1.3.3(1) a. - j. are also authorized to perform all other acts listed above in IRM 25.5.1.3.2(2).

25.5.1.3.4 (10-31-2006)
Authority to Serve Summonses

1. The following officers or employees have the authority to serve summonses:

A. Revenue Agents

B. Revenue Officers

C. Estate Tax Attorneys and Estate Tax Examiners

D. Revenue Service and Assistant Revenue Service Representatives

E. Tax Auditors

F. Tax Law Specialists

G. Compliance Officers

H. Tax Resolution Representatives

I. Tax Examiners, GS-5 and above (whose duties include contacting taxpayers in person)

J. Revenue Officer Aides GS-5 and above

K. Tax Fraud Investigative Aides, GS-5 and above

L. Personnel Security Officers

M. Property Appraisal and Liquidation Specialists

(The foregoing list sets forth those officers and employees who usually serve summonses. For a list of other persons having this delegated authority, see Deleg. Order No. 4.)

25.5.1.3.5 (10-31-2006)

Authority to Designate the Persons Who May Receive Summoned Testimony and Information

1. The following officers or employees are authorized to designate certain other employees as the individuals who will set the time and place of

examination, receive and examine summoned information and take the summoned person's testimony under oath. The persons authorized to designate are:

A. All persons listed in IRM 25.5.1.3.1 as being authorized to issue a John Doe summons,

B. All persons listed in IRM 25.5.1.3.2 as being authorized to issue any summons other than a John Doe summons,

C. All person listed in IRM 25.5.1.3.3 as being authorized to issue summonses to taxpayers being investigated and issue summonses to third-party witnesses but only with supervisory approval.

Note:

This authority may be redelegated to other officers and employees within the limits established in Deleg. Order No. 4.

2. The persons who may be designated to set the time and place of examination, to receive and examine summoned information, and to take the summoned person's testimony under oath are:

A. Chief Counsel Attorneys,

B. Special Agents,

C. Case Managers,

D. Group Managers,

E. Internal Revenue Agents,

F. Estate Tax Attorneys,

G. Estate Tax Law Clerks,

H. Estate Tax Examiners,

I. Revenue Service and Assistant Revenue Service Representatives,

J. Tax Auditors,

K. Revenue Officers,

L. Compliance Officers,

M. Tax Examiners whose duties include contacting taxpayers in person,

N. Tax Law Specialists,

O. Service Center Tax Examiners in the correspondence examination function.

* * * * *

25.5.2.5 (09-01-2006)
Chief Counsel Participation In Summoned Interviews

1. Chief Counsel attorneys may question summoned witnesses under oath and receive summoned books, papers, records, or other data in appropriate cases, such as investigations involving large deficiencies or liabilities, high profile taxpayers, and cases having unusually complex issues of fact or law. See Treas. Reg. § 301.7602-1(b); Delegation Order No. 4, para-

graph 13, (IRM 1.2.2). Counsel attorneys may directly question summoned witnesses and fully participate in a summoned interview along with an IRS officer or employee. The authority to directly question summoned witnesses is in addition to the other types of assistance given by Counsel attorneys to Service personnel in summoned interviews.

2. Even when Chief Counsel attorneys participate in summoned interviews, Examination, Collection, and Criminal Investigation personnel are responsible for developing and conducting the examination or investigation. Chief Counsel attorneys may not issue, serve, or approve the issuance of any summons.

* * * * *

25.5.4.4.8 (10-04-2006)
Effect of a Statutory Notice of Deficiency Or a Tax Court Proceeding On a Summons

1. The Tax Court has established a framework for determining when it is appropriate to prevent summoned information from being entered into evidence if the Service's use of a summons conflicts with the court's interest in administering its discovery rules.

2. If a summons is issued after a Tax Court petition is filed and that summons pertains to the same taxpayers and same taxable years as those before the court, the court will exercise its su-

pervisory power and exclude the information, unless the Service can show the summons was issued for sufficient reason, independent of that litigation. If the post-petition summons pertains to different taxpayers or different taxable years as those before the court, the court will not normally exercise its supervisory power unless the taxpayer can show a lack of an independent and sufficient reason for the summons.

3. In all but extraordinarily rare cases, the Service must not issue a summons after a Statutory Notice of Deficiency (SND) is mailed to the taxpayer to continue the investigation of the same taxable periods and liabilities covered by the SND. After an SND is mailed, the Service should no longer be in the process of gathering the data to support a determination because the SND represents the Service's presumptively correct determination and indicates the examination has been concluded. If the Service issues a summons after mailing the SND, this could be perceived as an effort to circumvent the Tax Court's discovery processes, which might lead the court to exclude the summoned evidence.

Note:

It may be appropriate to issue a summons after an SND has been mailed <u>but before a Tax Court petition has been filed</u> in rare situations in which an <u>independent and sufficient reason ex-</u>

ists to justify this action. An example of an independent and sufficient reason is when the Service is approached by a confidential informant after an SND is mailed. The informant identifies an issue that was not found during the examination, such as a hidden source of unreported income, and the Service needs to obtain evidence to prove the existence and amount of this income. In any case in which the Service seeks to issue a summons after an SND is mailed, the Service should obtain Associate Area Counsel's approval before issuing the summons. If field counsel approves the summons, the Service should make a record for its administrative file of the circumstances that gave rise to the post-SND summons and why field counsel concluded the circumstances justified the summons. This information may be necessary if the taxpayer seeks to exclude the summoned information from the Tax Court record.

* * * * *

Part 25. Special Topics
Chapter 5. Summons Handbook
Section 10. Enforcement of Summons

25.5.10 Enforcement of Summons

- 25.5.10.1 Overview
- 25.5.10.2 Appearance, Compliance or Noncompliance with a Summons

- 25.5.10.3 General Enforcement Procedures
- 25.5.10.4 Civil Enforcement of Summons
- 25.5.10.5 Criminal Enforcement of Summons
- 25.5.10.6 Protest Procedures in Civil Enforcement Cases
- 25.5.10.7 Protest Procedures in Criminal Enforcement Cases
- 25.5.10.8 Reports on Adverse Decisions in Civil Proceedings to Enforce Compliance with Summons
- Exhibit 25.5.10-1 Form 4443, Summons Referral
- Exhibit 25.5.10-2 Letter to Summoned Person from Associate Area Counsel
- Exhibit 25.5.10-3 Sample of a Declaration

* * *

25.5.10.3 (04-30-1999)
General Enforcement Procedures

1. A summoned party who fails to comply with a summons may be subject to:
   A. criminal proceedings under IRC 7210.
   B. civil proceedings under IRC 7604 to enforce compliance.
2. Report immediately, through channels to Associate Area Counsel, any refusal to comply or any

proceeding brought by the summoned party to quash a summons. Make every effort to obtain copies of the documents involved so that they can be forwarded to Associate Area Counsel.

3. Consider recommending civil enforcement action or criminal action when the person summoned neglects or refuses to comply. Do not refer a summons for enforcement in the following situations that might involve an abuse of process, or in other similar situations, as follows:

   A. The summoned party or their representative has contacted the Service and indicated a willingness to comply with the summons but has requested a reasonable extension of time within which to comply.

   B. The summoned party has appeared and denied under oath the possession or control of the documents called for in the summons, unless there is a good reason to believe the contrary.

   C. The Service has had possession of the documents for a sufficient period of time in which to examine and copy them. (See IRM 25.5.4.3 regarding photocopying summoned records).

Note:

This provision does not include cases which involve the withdrawal of consent to the use of records by an owner of records where the Service has not had sufficient time to examine and copy them.

D. Records of financial transactions are demanded before the summoned party could reasonably be expected to produce them.

E. More than one examination of the same records for the same purpose is sought under circumstances that might suggest harassment.

F. The summons has not been issued by a proper, delegated official.

G. The summons has not been properly served under IRC 7603.

H. The summons does not comply with the time requirements for production of documents under IRC 7605(a) and IRC 7609(a)(1).

I. The summons to a third party does not comply with the notice requirements under IRC 7609.

25.5.10.4 (04-30-1999)
Civil Enforcement of Summons

1. IRC 7604 provides for the civil enforcement of a summons.

2. Under IRC 7604(b), enforcement action may be initiated by applying for an attachment for an arrest against a person who has failed to obey a summons to a district judge or magistrate judge. When the person is brought before him or her, the district judge or magistrate judge will issue whatever order deemed proper to enforce compliance with the summons and to punish such person for default or disobedience. When a petition for attachment is filed, the court may choose to proceed by issuing an order to show cause why the summons should not be obeyed. It may also modify the summons if compliance would be unreasonable or oppressive.

3. Enforcement proceedings are usually commenced by filing a petition for a court order directing compliance with the summons. The summons (or a copy) should be attached to the petition or offered in evidence; otherwise, the court may not enforce it. Based upon the allegations, the court may issue either an order to show cause, or an ex parte (only one party represented) order directing compliance with the summons. The use of procedures other than attachment is authorized by IRC 7604(a), which

grants district courts jurisdiction to enforce compliance by appropriate process.

4. The Service employee who issued the summons is responsible for the preparation of all requests for civil enforcement of summonses. Use either the memorandum report format or Form 4443, Summons Referral, Exhibit 25.5.10–1. Include the following information in all requests for civil enforcement:

   A. The name, full address, and taxpayer identification number of the taxpayer;

   B. A brief summary of the pertinent facts;

   C. What the Service employee seeks to obtain by the summons;

   D. An explanation of the relevancy of the records sought where the relevancy is not obvious. For example, if records pertaining to years other than those under investigation are sought, the relevancy should be explained. Explain the relevancy of records pertaining to third parties, etc.;

   E. An explanation of the need or importance of such evidence to the success or completion of the investigation or examination;

   F. A statement that IRC 7609(a) notice has been served on persons or entities iden-

tified in the description of records or, if not, why it is believed notice is not necessary;

G. If a corporation is the party summoned, a statement of whether service of the summons has been made on a responsible officer and, if not, why not;

H. The circumstances surrounding contacts with the person summoned showing particularly the defense(s) claimed for refusing to comply with the summons and the circumstances under which the person summoned claimed the defense(s);

I. A transcript (if recorded) of the questions propounded to the person summoned and the person's answers;

J. The name of the IRS Revenue Agent, Special Agent, or Revenue Officer or, if none, why;

K. A description of any problems involving the imminent expiration of the statute of limitations with respect to either the criminal or the civil liability; and

L. A statement as to the existence of any known criminal investigations of the taxpayer by other federal agencies and,

in the instance of a corporate taxpayer, corporate officers or employees;

M. A statement as to any disclosures made pursuant to IRC 6103(i) concerning possible violations of criminal laws not within Service jurisdiction;

N. A statement as to any other known requests for summons or subpoena enforcement against the witness or related parties; and

O. If a pen register was used in the investigation prior to the issuance of the summons, a statement to that effect and the reason the pen register was used.

25.5.10.4.1 (08-01-2006)
Collection

1. Areas may decide whether Technical Services function, (TSf) or Group Managers will review summonses before they are referred to Associate Area Counsel. Consult Associate Area Counsel before implementing summons reviewed by Group Managers. If Group Managers are authorized to review summons referrals, establish a system to allow Associate Area Counsel to report to Collection any decrease of quality in the referrals.

25.5.10.4.1.1 (08-01-2006)
Referral

1. After a person neglects or refuses to comply with a summons, decide if summons enforcement is appropriate. Review the case file to ensure that all standards for preparation, issuance, and service of the summons were met.

2. Within 3 workdays following the appearance date (or the date of withdrawal of consent), prepare and send the summons referral to TSf.

   Note:

   If a DEL RET Supplement or IRMF transcript was requested, follow procedures in Preparation of Summons Referral.

3. Document the case file if the:

   A. decision is made not to enforce the summons; or

   B. summons is not referred within the time period described in (2) above.

* * * * *

PETITIONER'S BRIEF

RECORDS AND BRIEFS

Supreme Court, U.S.
FILED
FEB 14 2014
OFFICE OF THE CLERK

No. 13-301

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL CLARKE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether an unsupported allegation that the Internal Revenue Service (IRS) issued a summons for an improper purpose entitles an opponent of the summons to an evidentiary hearing to question IRS officials about their reasons for issuing the summons.

PARTIES TO THE PROCEEDINGS

The petitioner is the United States of America.

The respondents are Michael Clarke, as Chief Financial Officer of Beekman Vista, Inc.; Michael Clarke, as Chief Financial Officer of Dynamo GP, Inc.; Dynamo Holdings Limited Partnership; Rita Holloway, as Trustee for the 2005 Christine Moog Family Delaware Dynasty Trust; Marc Julien, as Trustee for the 2005 Robert Julien Family Delaware Dynasty Trust; and Robert Julien.

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In the Supreme Court of the United States

No. 13-301

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL CLARKE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the *Federal Reporter* but is reprinted in 517 Fed. Appx. 689. The order of the district court in the lead case in these consolidated actions (Pet. App. 10a-19a) is not published but is available at 111 A.F.T.R.2d 2013-1697. The orders of the district court in the remaining cases (Pet. App. 20a-63a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 2013 (Pet. App. 7a-9a). On July 5, 2013, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including August 16, 2013. On August 12, 2013, Justice Thomas further extended the time to September 6, 2013, and the petition was filed on that date. The petition for a

writ of certiorari was granted on January 10, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-6a.

STATEMENT

1. Congress has "authorized and required" the Secretary of the Treasury "to make the inquiries, determinations, and assessments of all taxes" imposed by the Internal Revenue Code (Code) that "have not been duly paid by stamp at the time and in the manner provided by law." 26 U.S.C. 6201(a); see 26 U.S.C. 7601(a) ("The Secretary shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax."). The Secretary has delegated that duty to the Commissioner of Internal Revenue. 26 C.F.R. 301.7602-1(b), 301.7701-9.

As the Secretary's delegate, the Internal Revenue Service (IRS or Service) has broad statutory authority to issue summonses in furtherance of its investigatory responsibility. "For the purpose of ascertaining the correctness of any return, making a return where none has been made, [or] determining the liability of any person for any internal revenue tax," the Commissioner is authorized "[t]o examine any books, papers, records, or other data which may be relevant or material to such inquiry," and to summon any person to appear and produce such documents and to give relevant testimony. 26 U.S.C. 7602(a)(1)-(3). Section

7602(b) further provides that the IRS may issue a summons, examine documents, or take testimony for "the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws." The Service thus "has broad authority to examine the accuracy of federal tax returns," including the authority to issue summonses. *Church of Scientology* v. *United States*, 506 U.S. 9, 10 n.2 (1992); see *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 816 (1984) ("In order to encourage effective tax investigations, Congress has endowed the IRS with expansive information-gathering authority; § 7602 is the centerpiece of that congressional design."); *United States* v. *Euge*, 444 U.S. 707, 716 n.9 (1980) ("Congressional intent to provide the Secretary with broad latitude to adopt enforcement techniques helpful in the performance of his tax collection and assessment responsibilities is expressed throughout the Code.").

When a summoned party fails to comply with a summons, the United States may petition a federal district court to enforce the summons. 26 U.S.C. 7402(b), 7604(a). Congress intended summons-enforcement proceedings to be "summary in nature." *United States* v. *Stuart*, 489 U.S. 353, 369 (1989) (quoting S. Rep. No. 494, 97th Cong., 2d Sess. 285 (1982) (*1982 Senate Report*)). The purpose of such a proceeding is not to determine guilt or tax liability, but to obtain information relevant to the IRS's fulfillment of its statutory obligation to examine tax returns. In order to enforce a contested summons, the IRS must demonstrate that: (1) "the investigation will be conducted pursuant to a legitimate purpose"; (2) "the inquiry may be relevant to the purpose"; (3) "the information sought is not already within the Commissioner's pos-

session"; and (4) "the administrative steps required by the [Internal Revenue] Code have been followed." *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964). Such a showing demonstrates "good faith in issuing the summons." *Stuart*, 489 U.S. at 359; see *United States* v. *LaSalle Nat'l Bank*, 437 U.S. 298, 318 (1978).[1]

The government generally satisfies its initial burden of demonstrating good faith by filing an affidavit from the investigating agent attesting to the *Powell* factors. *United States* v. *Medlin*, 986 F.2d 463, 466 (11th Cir.), cert. denied, 510 U.S. 933 (1993); *United States* v. *Garden State Nat'l Bank*, 607 F.2d 61, 68 (3d Cir. 1979); see *Stuart*, 489 U.S. at 360 (noting that affidavits filed by the IRS "plainly satisfied the requirements of good faith [the Court] set forth in *Powell* and [later] repeatedly reaffirmed"). Once the United States has made its initial showing of good faith, the burden is on the party challenging a summons either to disprove one of the *Powell* factors or to demonstrate that enforcement of the summons would constitute an abuse of the court's process (because, for example, it was issued for an improper purpose). *Powell*, 379 U.S. at 57-58; see *Stuart*, 489 U.S. at 360.

2. a. IRS agents examined the information returns of Dynamo Holdings Limited Partnership (DHLP) for the 2005 through 2007 tax years. Pet. App. 10a-11a, 21a, 32a, 43a, 54a. During the examination, questions arose about debt that DHLP had reported on its returns, including interest expenses totaling $34 million

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[1] The IRS may not issue a summons or initiate an enforcement proceeding, however, if the Service has referred the relevant taxpayer to the Department of Justice for potential criminal prosecution. 26 U.S.C. 7602(d).

over two years. *Id.* at 11a, 21a, 32a, 43a, 54a. In September and October 2010, as part of an effort to obtain information for the investigation, the IRS issued five summonses to third parties connected to DHLP whom the Service had reason to believe had information and records relevant to DHLP's tax-reporting obligations during the tax years at issue. *Id.* at 11a-12a, 21a-22a, 32a-33a, 43a-44a, 54a-55a; Gov't C.A. Br. 3-5. The summonses directed the recipients to give testimony and to produce for examination certain books, records, papers, and other data relating to the investigation. Pet. App. 11a-12a, 21a-22a, 32a-33a, 43a-44a, 54a-55a. None of the five recipients complied with the summonses. *Ibid.*

In December 2010, pursuant to 26 U.S.C. 6223, the IRS issued to the partnership's tax-matters partner a Notice of Final Partnership Administrative Adjustment (FPAA) that proposed adjustments to items on the partnership's information returns for 2005 through 2007. Pet. App. 12a, 22a, 33a, 44a, 55a; J.A. 60-92. For partnerships, an FPAA serves the same purpose that a notice of deficiency serves for an individual taxpayer, and it is generally a prerequisite to any assessment by the IRS of a deficiency attributable to the partnership. See 26 U.S.C. 6221-6223. The issuance of an FPAA gives certain partners in the relevant partnership the right to challenge the adjustment in the United States Tax Court, a district court, or the Court of Federal Claims. 26 U.S.C. 6226(a); see Pet. App. 12a, 22a, 33a, 44a, 55a. In February 2011, the partnership filed a petition for readjustment in the Tax Court, challenging the determinations in the FPAA. *Ibid.* That proceeding remains

pending. See *DHLP* v. *Commissioner*, Docket No. 2685-11 (T.C.).

b. Because the recipients of the above-described summonses did not comply with the summonses, the United States filed five petitions for enforcement in the United States District Court for the Southern District of Florida. Pet. App. 12a, 22a, 33a, 44a, 55a. The United States attached to each petition a declaration, attesting to satisfaction of the *Powell* factors, executed by the IRS agent who had issued the relevant summons. See *id.* at 12a-14a, 22a-24a, 33a-35a, 44a-46a, 55a-57a. DHLP intervened as a respondent, and several respondents moved for summary dismissal of the petitions or, alternatively, for the scheduling of a pretrial conference to allow discovery. See *id.* at 10a-11a, 20a-21a, 31a-32a, 42a-43a, 64a-84a; Gov't C.A. Br. 2-3.

In support of those requests, respondents asserted that "[t]here must have been some ulterior motive" (*i.e.*, other than a legitimate investigatory purpose) for the IRS's issuance of the summonses. Pet. App. 72a. Respondents identified several possible allegedly illicit motives, including "retribution for DHLP's refusal to grant a further extension of the applicable statute of limitations, a subterfuge to gather information related to [another party], in order to justify reopening the examination of its returns for the same periods or part of a larger scheme on the part of the government to send out such summonses in hopes of being able to use them to subvert the Tax Court Discovery Rules once a Tax Court case was commenced." *Ibid.*; see J.A. 48, 51-53. Respondents argued that they were entitled to "explore" their allegations through discovery and an evidentiary hearing. Pet.

App. 73a-75a; J.A. 54-55. They did not identify any evidence already available to them that would support their allegations.

c. The district court ordered the summonses enforced. Pet. App. 10a-63a. The court held that respondents had failed to rebut the United States' prima facie case for enforcement under *Powell*. *Id.* at 13a, 23a, 34a, 45a, 56a. The court also rejected respondents' various allegations of ulterior motive as legally irrelevant, conjectural, or incorrect as a matter of law. *Id.* at 13a-17a, 23a-27a, 34a-38a, 45a-49a, 56a-60a.

Although the district court recognized that a summons opponent is entitled to a limited adversarial hearing, it denied respondents' requests for discovery and for an opportunity to question IRS agents. Pet. App. 17a-18a, 27a-28a, 38a-39a, 49a-50a, 60a-61a. The court explained that a district court is not required to hold an evidentiary hearing at which a summons opponent may examine IRS agents "upon a mere allegation of improper purpose." *Id.* at 17a. The court observed that, in *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310 (1985), this Court had "upheld the denial of an evidentiary hearing in a summons enforcement proceeding under similar circumstances." Pet. App. 17a; see *id.* at 17a-18a, 27a-28a, 38a-39a, 49a-50a, 60a-61a. The district court explained that, because respondents had made "no meaningful allegations of improper purpose" that warranted discovery or an opportunity to question IRS officials, it declined to order either. *Id.* at 18a, 28a, 39a, 50a, 61a.

3. The court of appeals reversed. Pet. App. 1a-6a. The court of appeals agreed with the district court that respondents were not entitled to discovery based "on a mere allegation of improper purpose." *Id.* at 5a

n.3 (quoting *Nero Trading, LLC* v. *U.S. Dep't of Treasury, IRS*, 570 F.3d 1244, 1249 (11th Cir. 2009)). The court held, however, that the district court had abused its discretion by declining to hold an evidentiary hearing at which respondents may examine IRS agents. The court based that holding on respondents' allegation that the Service "may have issued the summonses * * * solely in retribution for [DHLP's] refusal to extend a statute of limitations deadline." *Id.* at 4a-5a. In the view of the court of appeals, respondents were "entitled to a hearing to explore their allegation of an improper purpose," *id.* at 5a, and "to ascertain whether the [IRS] issued a given summons for an improper purpose," *id.* at 6a (quoting *Nero Trading*, 570 F.3d at 1249).

The court of appeals also stated that, "in situations such as this, requiring the taxpayer to provide factual support for an allegation of an improper purpose, without giving the taxpayer a meaningful opportunity to obtain such facts, saddles the taxpayer with an unreasonable circular burden, creating an impermissible 'Catch 22.'" Pet. App. 5a (quoting *Nero Trading*, 570 F.3d at 1250). The court explained that on remand, respondents "should be permitted to 'question IRS officials concerning the Service's reasons for issuing the summons[es].'" *Id.* at 6a (quoting *United States* v. *Southeast First Nat'l Bank*, 655 F.2d 661, 667 (5th Cir. 1981) (brackets in original)).

SUMMARY OF ARGUMENT

Before a district court will enforce an IRS summons, the Service must make a prima facie showing that the summons was issued in good faith and in compliance with applicable legal requirements. When the IRS makes that showing, it is entitled to have its

summons enforced unless a summons objector rebuts the prima facie case by presenting sufficient evidence from which the district court may infer bad faith. The court below held that, whenever a summons objector alleges that the IRS issued a summons for improper reasons, the objector is entitled to an evidentiary hearing at which it may examine IRS agents about their motives. The court thus erroneously reduced to zero the amount of evidence that is required to rebut a showing of good faith.

A. Congress has directed the IRS to make "inquir[ies] after and concerning all persons * * * who may be liable to pay any internal revenue tax." 26 U.S.C. 7601(a). To assist the Service in performing that duty, Congress empowered the agency to issue summonses "[f]or the purpose of ascertaining the correctness of any [tax] return, * * * determining the liability of any person for any internal revenue tax * * * , or collecting any such liability." 26 U.S.C. 7602(a). That summons authority is expansive and is essential to the proper functioning of our federal tax system, which depends substantially on taxpayers' self-reporting of information relevant to the determination of tax liabilities. The Court has analogized the IRS's broad summons authority to a grand jury's expansive power to subpoena individuals to testify, explaining that both powers invoke the broad testimonial duty that all citizens owe to the government.

When a taxpayer refuses to comply with an IRS summons, the IRS may apply to a district court for enforcement. In such circumstances, the Service must establish that it issued the summons in good faith and in compliance with applicable legal requirements. Summons objectors may challenge a summons on legal

grounds and may present any evidence in their possession that would impugn the Service's good faith. That system provides taxpayers with substantial protection against the potential for abuse of IRS summonses. As this Court has recognized, however, Congress intended summons-enforcement proceedings to be summary in nature. Thus, when the IRS establishes its good faith and a summons objector presents no evidence to contradict that showing, the objector need not be given an opportunity to probe the motives of the responsible agency officials.

B. A summons objector is not automatically entitled to an evidentiary hearing at which he may question IRS officials about their motives for issuing a summons. To be sure, if an objector presents evidence to support an inference of improper motive—or if a district court otherwise believes that such an opportunity for examination is appropriate—the district court may hold a hearing and require IRS agents to justify their actions. When an objector makes unsupported allegations of bad faith, however, a district court should have the discretion to deny the objector's request to examine IRS agents. Summons objectors are not entitled to delay congressionally authorized investigations and to consume time and agency resources unless they can substantiate an initial claim of bad faith with at least some evidence.

The court of appeals' contrary holding is inconsistent not only with this Court's decisions in the specific context of IRS summons enforcement, but also with the presumption of regularity that generally attaches to the conduct of government agents. It is also inconsistent with this Court's longstanding treatment of the analogous investigatory powers of grand

juries and other government agencies. This Court has been reluctant to embrace any departure from the default rule of mandatory compliance, particularly when such a departure would delay the relevant investigation or require procedural detours.

C. The district court did not abuse its discretion when it declined to offer respondents an opportunity to examine IRS agents. The court correctly found that respondents had presented no factual support for their allegations of improper purpose. The Eleventh Circuit's automatic-examination rule is inconsistent with Congress's intent that summons-enforcement proceedings be expeditious, undermines the smooth functioning of the federal tax system, and conflicts with the rules that apply in every other court of appeals. The judgment below should be reversed.

ARGUMENT

AN UNSUPPORTED ALLEGATION THAT THE IRS ISSUED A SUMMONS FOR AN IMPROPER PURPOSE DOES NOT ENTITLE THE OPPONENT OF THE SUMMONS TO AN EVIDENTIARY HEARING AT WHICH IT MAY QUESTION IRS AGENTS ABOUT THEIR MOTIVES FOR ISSUING THE SUMMONS

Before the IRS is entitled to judicial enforcement of a summons issued pursuant to 26 U.S.C. 7602, the Service must establish that the summons was issued in good faith by demonstrating that the factors set forth in *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964), have been satisfied. Under the rule adopted by the Eleventh Circuit, however, such a showing of good faith is insufficient to obtain an enforcement order if a summons opponent alleges that the IRS issued the summons for an improper purpose, even if the allegation is wholly speculative and lacking in evidentiary

support. The court below held that such an allegation, standing alone, entitles the summons opponent to an evidentiary hearing at which it may question IRS agents about their motives for issuing the summons. That holding, which conflicts with decisions of every other court of appeals with jurisdiction over IRS summons actions,[2] is inconsistent with the effective enforcement of federal tax laws and with this Court's decisions delineating the IRS's summons authority and analogous government powers of investigation.

A. The IRS's Summons Authority Is Broad And Should Be Summarily Enforced

1. Congress has "authorized and required" the IRS "to make the inquiries, determinations, and assessments of all taxes" imposed by the Internal Revenue Code, 26 U.S.C. 6201(a), including by making a "[c]anvass" of every internal revenue district and "inquir[ies] after and concerning all persons therein who may be liable to pay any internal revenue tax," 26

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[2] *United States* v. *Judicial Watch, Inc.*, 371 F.3d 824, 830-831 (D.C. Cir. 2004); *Sugarloaf Funding, LLC* v. *U.S. Dep't of the Treasury*, 584 F.3d 340, 350-351 (1st Cir. 2009); *United States* v. *Tiffany Fine Arts, Inc.*, 718 F.2d 7, 14 (2d Cir. 1983), aff'd, 469 U.S. 310 (1985); *United States* v. *Garden State Nat'l Bank*, 607 F.2d 61, 71 (3d Cir. 1979); *Hintze* v. *I.R.S.*, 879 F.2d 121, 126-127 (4th Cir. 1989), overruled on other grounds by *Church of Scientology* v. *United States*, 506 U.S. 9 (1992); *Zugerese Trading LLC* v. *IRS*, 336 Fed. Appx. 416, 419 (5th Cir. 2009); *Phillips* v. *United States*, No. 98-3128, 1999 WL 228585, at *4 (6th Cir. Mar. 10, 1999); *United States* v. *Kis*, 658 F.2d 526, 539-540 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982); *United States* v. *National Bank*, 622 F.2d 365, 367 (8th Cir. 1980); *Fortney* v. *United States*, 59 F.3d 117, 121 (9th Cir. 1995); *United States* v. *Balanced Fin. Mgmt., Inc.*, 769 F.2d 1440, 1444-1445 (10th Cir. 1985); see generally Pet. 15-19.

U.S.C. 7601(a). To facilitate the agency's performance of those statutory responsibilities, Congress has granted the IRS broad authority to issue summonses "[f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax * * *, or collecting any such liability." 26 U.S.C. 7602(a). This Court has repeatedly recognized that the IRS's summons authority is broad and serves a vital information-gathering role in our federal tax system. See, *e.g.*, *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 814-815 (1984); *United States* v. *Euge*, 444 U.S. 707, 714 (1980); *United States* v. *Bisceglia*, 420 U.S. 141, 145-146 (1975).

As the Court explained in *Arthur Young & Co.*:

> Our complex and comprehensive system of federal taxation, relying as it does upon self-assessment and reporting, demands that all taxpayers be forthright in the disclosure of relevant information to the taxing authorities. Without such disclosure, and the concomitant power of the Government to compel disclosure, our national tax burden would not be fairly and equitably distributed. In order to encourage effective tax investigations, Congress has endowed the IRS with expansive information-gathering authority; § 7602 is the centerpiece of that congressional design.

465 U.S. at 815-816. Congress established a system of taxation in which "the Government depends upon the good faith and integrity of each potential taxpayer to disclose honestly all information relevant to tax liability." *Bisceglia*, 420 U.S. at 145. In administering the statutory scheme, however, "it would be naive to ignore the reality that some persons attempt to outwit

the system, and tax evaders are not readily identifiable." *Ibid.* The IRS's authority to investigate pursuant to Section 7601, and to effectuate such investigations by issuing summonses pursuant to Section 7602, therefore "are essential to our self-reporting system." *Id.* at 146.

The breadth of the IRS's summons authority is confirmed by this Court's repeated recognition that the IRS's "power to summon and inquire" is similar to the power of grand juries to investigate possible crimes and the power of other administrative agencies to collect information through analogous subpoena authority. *Bisceglia*, 420 U.S. at 147-148; see *Powell*, 379 U.S. at 57. The Court has noted that "the language of § 7602 suggests an intention to codify a broad testimonial obligation" that has its source in the common law. *Euge*, 444 U.S. at 714; see *id.* at 712, 714 n.8 (noting that "the common-law duties attaching to the issuance of a testimonial summons" provide, by "analogy," an "interpretive guide" "[i]n determining the scope of the obligation Congress intended to impose" in Section 7602). At common law, the testimonial obligation is expansive: "For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence." *United States* v. *Bryan*, 339 U.S. 323, 331 (1950) (quoting 8 John Henry Wigmore, *Evidence* § 2192 (3d ed. 1940)); see *Blair* v. *United States*, 250 U.S. 273, 279 (1919). It has thus long been established "that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony when-

ever he is properly summoned." *Blackmer* v. *United States*, 284 U.S. 421, 438 (1932).

A citizen's testimonial duty extends as well to compliance with summonses issued by administrative bodies pursuant to congressional authorization. See 1 Kenneth Culp Davis, *Administrative Law Treatise* § 3.04, at 176 (1958) ("Long-standing tradition permits the use of subp[o]enas in aid of grand jury proceedings. The authorities are now clear that the same may be done in aid of the administrative counterpart of grand jury proceedings." (internal footnote omitted)); 8 John Henry Wigmore, *Wigmore on Evidence*, § 2192, at 70 (McNaughton ed. 1961) (*Wigmore*) (same). Section 7602 imposes just such an "expansive" "'testimonial' or evidentiary duty" on the recipients of IRS summonses. *Euge*, 444 U.S. at 712 (internal footnote omitted); see *id.* at 714. Accordingly, "this Court has consistently construed congressional intent to require that if the summons authority claimed is necessary for the effective performance of congressionally imposed responsibilities to enforce the tax Code, that authority should be upheld absent express statutory prohibition or substantial countervailing policies." *Id.* at 711.

2. When a taxpayer refuses to comply with an IRS summons, the Service may file an enforcement petition in a federal district court. See 26 U.S.C. 7402(b), 7604(a); *Donaldson* v. *United States*, 400 U.S. 517, 524 (1971). That enforcement scheme reflects Congress's recognition that "the authority vested in tax collectors [by Sections 7601 and 7602] may be abused, as all power is subject to abuse." *Bisceglia*, 420 U.S. at 146. The solution that Congress adopted, however, "is not to restrict that authority so as to undermine the efficacy of the federal tax system, which seeks to assure

that taxpayers pay what Congress has mandated and to prevent dishonest persons from escaping taxation thus shifting heavier burdens to honest taxpayers." *Ibid.* Instead, "[s]ubstantial protection is afforded by the provision that an Internal Revenue Service summons can be enforced only by the courts." *Ibid.*; see *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964); see also *Wigmore* § 2195, at 87-88 (noting that the "ultimate act of enforcing answers" to agency requests for information is "generally held to be a judicial act requiring resort to a superior court for a ruling").

When Congress authorized district courts to enforce Section 7602 summonses, it did not "intend[] the courts to oversee the [IRS's] determinations to investigate." *Powell*, 379 U.S. at 56. A district court's role in deciding whether to enforce a summons is limited to determining whether the summons was issued in good faith—*viz.*, whether the investigation will be conducted pursuant to a legitimate purpose, whether the summons inquiry may be relevant to that purpose, whether the information sought is not already in the possession of the IRS, and whether the administrative steps required by the Code have been followed. *Id.* at 57-58. If the IRS makes that showing, it is entitled to have its summons enforced. *United States* v. *Stuart*, 489 U.S. 353, 356 (1989) ("So long as the summons meets statutory requirements and is issued in good faith, as we defined that term in *United States* v. *Powell*, compliance is required.") (internal citation omitted).

Congress intended that summons-enforcement proceedings would "be summary in nature." *Stuart*, 489 U.S. at 369 (quoting *1982 Senate Report* 285). Because summons proceedings do not accuse any tax-

payer of wrongdoing, *Bisceglia*, 420 U.S. at 146, enforcement of a summons is not a determination of guilt or liability. The purpose of the summons scheme is "to inquire," *ibid.*, and swift resolution of summons disputes is essential "so that the investigation may advance toward the ultimate determination of civil or criminal liability, if any," *United States* v. *Kis*, 658 F.2d 526, 535 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982).

Congress's intent that summons proceedings be resolved expeditiously is also reflected in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324. In *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), the Court held that the IRS could not issue a summons if the Service had already made an "institutional commitment" to refer the relevant taxpayer to the Department of Justice for possible criminal prosecution. *Id.* at 313-318. In the ensuing four years, that holding "spawned protracted litigation" in summons proceedings about the IRS's motives for issuing particular summonses, "without any meaningful results for the taxpayer." *1982 Senate Report* 285. Congress viewed such proceedings as "wasteful litigation" and responded by enacting TEFRA. *Ibid.*

TEFRA expanded the IRS's summons authority to encompass the investigation of "any offense" as long as the IRS has not actually referred the matter to the Department of Justice. See TEFRA § 333, 96 Stat. 622; 26 U.S.C. 7602(b) and (d). To reduce the volume of litigation associated with enforcement of IRS summonses, Congress thus replaced the prior "institutional commitment" standard, which turned in part on IRS officials' subjective intent regarding potential

criminal referrals, with an objective standard that turns on the presence or absence of an actual referral. By vesting summons opponents with the right to question IRS officials about their motives for issuing summonses, even in the absence of any reason to infer abuse, the Eleventh Circuit's inflexible rule frustrates Congress's stream-lining purposes in enacting that provision.

B. When A Summons Opponent Offers Only An Unsupported Allegation Of IRS Bad Faith, A District Court Does Not Abuse Its Discretion By Declining To Provide The Opponent An Opportunity To Examine IRS Agents About Their Motives For Issuing The Summons

1. Before enforcing an IRS summons, a district court must assure itself that the summons complies with the applicable statutory requirements and was issued in good faith. In *Powell*, this Court set forth the factors that a district court should consider in making that evaluation. 379 U.S. at 57-58; see *Stuart*, 489 U.S. at 356. As in this case, the IRS generally makes a prima facie showing that a summons is valid and was issued in good faith by filing an affidavit attesting to satisfaction of the *Powell* factors. *Stuart*, 489 U.S. at 360; see J.A. 24-36. A summons opponent may challenge the enforcement of a summons on "any appropriate ground." *Reisman*, 375 U.S. at 449. A summons opponent is entitled to a reasonable opportunity, including if appropriate an in-person adversary hearing, to present legal argument as to why a summons should be quashed. If a summons opponent alleges that a summons was issued for an improper purpose, he is also entitled to a reasonable opportuni-

ty to apprise the court of any evidence already in his possession that substantiates the allegation.

It does not logically follow, however, that a summons opponent should in every instance be entitled upon request to question IRS officials about their reasons for issuing a summons. But that is what the court of appeals held in this case. Without examining whether respondents had presented any evidence (or otherwise raised an inference) of bad faith, the court held that a district court necessarily abuses its discretion by denying an examination request whenever a taxpayer makes an "allegation of an improper purpose." Pet. App. 5a.

Respondents attempted in their brief in opposition to recast the court of appeals' decision as requiring a summons opponent to demonstrate a "substantial" basis for alleging bad faith by the IRS. See Br. in Opp. 10, 12, 13, 17, 18, 20, 21. But nothing in the decision below suggests that an allegation of bad faith must be "substantial," or supported by evidence already in the summons opponent's possession, in order to trigger an absolute right to examine IRS agents. On the contrary, the court of appeals specifically rejected such a limitation as unduly restrictive, stating that "in situations such as this, requiring the taxpayer to provide factual support for an allegation of an improper purpose, without giving the taxpayer a meaningful opportunity to obtain such facts, saddles the taxpayer with an unreasonable circular burden, creating an impermissible 'Catch 22.'" Pet. App. 5a.

Respondents' gloss on the opinion below also ignores the court of appeals' separate holding that respondents were "not entitled to discovery" because "the full 'panoply of expensive and time-consuming

pretrial discovery devices may *not* be resorted to as a matter of course and on a mere allegation of improper purpose.'" Pet. App. 5a n.3 (quoting *Nero Trading, LLC* v. *U.S. Dep't of Treasury, IRS*, 570 F.3d 1244, 1249 (11th Cir. 2009)). That rationale for denying discovery "on a mere allegation of improper purpose" would make no sense if the court believed that respondents had made a substantial threshold showing of agency bad faith. Read as a whole, the court's opinion unambiguously holds that, although a "mere allegation of improper purpose" does not entitle a summons opponent to broad discovery, it *does* entitle him to question IRS agents about their reasons for issuing the summons. See *id.* at 5a-6a & n.3.[3] That holding is inconsistent with the core premises on which the IRS's summons-enforcement practices are based, and it improperly invites the "protracted" and "wasteful" litigation in summons cases that Congress sought to eliminate in 1982. See *1982 Senate Report* 285.

2. In any IRS summons-enforcement proceeding, an objector is entitled to an adversary hearing where it "may challenge the summons on any appropriate ground" by (for example) making legal arguments or presenting evidence already in the opponent's possession. *Powell*, 379 U.S. at 58 (quoting *Reisman*, 375

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[3] Similarly in *Nero Trading*, the Eleventh Circuit "simply refuse[d] to create a rule that would require [a] taxpayer to allege a factual background" for a charge of bad faith "before he is entitled to" "question the Service concerning its reasons for issuing the summonses." 570 F.3d at 1250. Although the court of appeals in *Nero Trading* stated that "the scope of any adversarial hearing in this area is left to the discretion of the district court," it made clear that in determining the "scope" of an adversarial hearing in this context, district courts in the Eleventh Circuit may not deny a summons opponent's request to question IRS officials. *Id.* at 1249.

U.S. at 449). The objector is not entitled, however, to engage in a fishing expedition about the motives of IRS agents when no pre-existing evidence raises an inference of improper purpose. Once the government makes a prima facie showing that it issued a challenged summons in good faith, it is entitled to have the summons enforced unless the objector "develop[s] facts from which a court might *infer* a *possibility* of some wrongful conduct by the Government." *Kis*, 658 F.2d at 540; see *Powell*, 379 U.S at 51, 56-58. And when a summons opponent seeks to probe IRS officials' motives for issuing the summons, based on an unsupported allegation of bad faith, a district court should have discretion to deny the objector's request.

Although the court below relied in part on *Powell*, see Pet. App. 3a-5a (citing 379 U.S. at 48, 57-58), the Court in *Powell* made clear that a summons opponent bears a heavy burden in challenging the enforcement of a summons. Once the IRS establishes that the summons was issued in good faith, it is entitled to enforce the summons. 379 U.S. at 57-58. A district court remains free thereafter to inquire into the IRS's motive for issuing a summons, but it is *required* to do so only if the taxpayer satisfies his "burden of showing an abuse of the court's process." *Id.* at 58. A taxpayer cannot satisfy that burden with bare assertions, but must "raise[] a substantial question that judicial enforcement of the administrative summons would be an abusive use of the court's process." *Id.* at 51.

3. When a summons opponent asserts that an IRS summons was issued for an improper purpose, but offers no evidence to support that allegation, a district court should have discretion to decline to hold an evidentiary hearing. Such a rule—adopted in every

other court of appeals with jurisdiction over IRS summons actions (see note 2, *supra*)—is consistent with the longstanding principle that "[e]very public officer is presumed to act in obedience to his duty, until the contrary is shown." *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19, 33 (1827). "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926); see *United States Postal Serv.* v. *Gregory*, 534 U.S. 1, 10 (2001). Courts therefore may not infer wrongdoing on the part of a government official based on a mere allegation of improper motive.

Even when an allegation of improper motive is ultimately rejected on the merits, protracted inquiry into that charge may impede the effective conduct of the government's business. For that reason, this Court observed in a related context that "[t]he justifications for a rigorous standard for the elements of a selective-prosecution claim * * * require a correspondingly rigorous standard for discovery in aid of such a claim." *United States* v. *Armstrong*, 517 U.S. 456, 468 (1996). Although the court of appeals in this case held that respondents were "not entitled to discovery," Pet. App. 5a n.3, it required the district court to convene an evidentiary hearing at which respondents will be allowed to question IRS officials regarding their motives for issuing the summonses at issue here. The court of appeals' treatment of unsupported allegations of improper motive as triggering such a requirement cannot be reconciled with the presumption of regularity.

4. The court of appeals' automatic-examination rule is also inconsistent with this Court's longstanding treatment of analogous testimonial obligations in other contexts.

This Court has analogized the IRS's summons authority under Section 7602 to the "subpoena power under the Fair Labor Standards Act" of the Department of Labor (DOL), and to the Federal Trade Commission's "power of inquisition," including its authority to require compliance reports. *Powell*, 379 U.S. at 57 (citing *Oklahoma Press Publ'g Co.* v. *Walling*, 327 U.S. 186, 216 (1946); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950)). In construing the DOL's analogous subpoena power in *Oklahoma Press Publishing Co.*, this Court recognized that the agency could not use its subpoena power for a harassing or otherwise improper purpose, and that the recipient of a subpoena is entitled to "make 'appropriate defence' surrounded by every safeguard of judicial restraint." 327 U.S. at 217 (quoting *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48 (1938)). The Court emphasized, however, that the subpoena objectors bore the "burden" of establishing such an improper purpose, and that the DOL was entitled to enforce its subpoenas in the absence of such a showing. *Id.* at 218 ("No sufficient reason was set forth in the returns or the accompanying affidavits for not enforcing the subpoenas, a burden petitioners were required to assume in order to make 'appropriate defence.'").

Similarly in *Morton Salt Co.*, the Court upheld enforcement of the Federal Trade Commission's investigative authority to require compliance reports. 338 U.S. at 640-644. As in *Oklahoma Press Publishing*

Co., the Court recognized that the agency could not exercise its investigative authority arbitrarily. *Id.* at 653. The Court explained, however, that the objecting corporation bore the burden of "present[ing] evidence" and "ma[king] a record" that a Commission order imposed an unreasonable burden. *Id.* at 653-654.

This Court has also stated that the IRS's summons authority is similar to—and should be interpreted in light of—the authority of grand juries to issue subpoenas. *Bisceglia*, 420 U.S. at 147-148; *Powell*, 379 U.S. at 57; pp. 14-15, *supra*. As with administrative subpoenas and summonses, a grand jury may not use its investigative power to harass potential witnesses. *United States* v. *R. Enterprises, Inc.*, 498 U.S. 292, 299 (1991); see *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973); *Branzburg* v. *Hayes*, 408 U.S. 665, 707-708 (1972). The Court has never suggested, however, that an unsupported allegation of a harassing motive would be sufficient to excuse prompt compliance with a grand jury subpoena or to justify discovery into the grand jury's motives in issuing a subpoena. On the contrary, the Court has emphasized that a grand jury subpoena "is presumed to be reasonable, and the burden of showing unreasonableness must be on the recipient who seeks to avoid compliance." *R. Enterprises, Inc.*, 498 U.S. at 301.

The Court therefore has been reluctant to require grand juries to submit to inquiries into their motives for issuing subpoenas, explaining that procedures "that would saddle a grand jury with minitrials and preliminary showings would assuredly * * * frustrate the public's interest in the fair and expeditious administration of the criminal laws." *Dionisio*, 410

U.S. at 17; see *R. Enterprises, Inc.*, 498 U.S. at 298-299. Thus, even when harassment is alleged in connection with a grand jury subpoena, a grand jury should not be detained with "procedural delays and detours," *R. Enterprises, Inc.*, 489 U.S. at 298, unless the objector can support its allegations with sufficient evidence to at least raise an inference of possible wrongdoing. See *United States* v. *Sterling*, 724 F.3d 482, 495-496 (4th Cir. 2013); see also *Dionisio*, 410 U.S. at 12 (upholding enforcement of contempt for failure to comply with grand jury subpoena when there was "no indication" that the grand jury had acted for purposes of "harassment"); *Branzburg*, 408 U.S. at 709-710 (Powell, J., concurring) (noting that a newsman may be excused from compliance with a grand jury subpoena if he "has some * * * reason to believe that" the request for his testimony is "without a legitimate need of law enforcement").

To be sure, the IRS's summons authority is not directly governed by this Court's decisions addressing the subpoena power of grand juries or other federal agencies. But this Court's repeated statements that such cases are helpful in delineating the IRS's Section 7602 authority, *Euge*, 444 U.S. at 712, 714; *Bisceglia*, 420 U.S. at 147-148; *Powell*, 379 U.S. at 57, reflect the similar purposes of the respective authorities. The IRS, no less than the grand jury, is charged with investigating subjects within its purview. Neither entity's inquiry establishes guilt or liability; both are essential to determine whether wrongdoing has occurred. The efficient collection of internal revenue taxes authorized by statute is vital to the Nation's well-being, and Congress accordingly has required

taxpayers "to disclose honestly all information relevant to tax liability." *Bisceglia*, 420 U.S. at 145.

As with grand jury investigations, this Court has been appropriately loath to complicate summons-enforcement proceedings in a way that would "stultify the Service's every investigatory move" or "thwart and defeat the appropriate investigatory powers that Congress has placed in 'the Secretary or his delegate.'" *Donaldson*, 400 U.S. at 531, 533. Such reluctance is especially appropriate here because the obligation to respond to IRS summonses functions as a sensible corollary to the affirmative duty of all taxpayers to apprise the Service of the information it needs to ascertain their tax liability. The common-law "duty to appear and testify" that "every person within the jurisdiction of the Government is bound to perform upon being properly summoned," *Blair*, 250 U.S. at 280-281, should apply with particular force in a legal context where self-reporting is the norm rather than the exception. "There is thus a formidable line of precedent construing congressional intent to uphold the claimed enforcement authority of the Service if [such] authority is necessary for the effective enforcement of the revenue laws and is not undercut by contrary legislative purposes." *Euge*, 444 U.S. at 715-716. The aberrant rule applied by the court below disserves the intent of Congress and should not be allowed to stand.

C. The District Court Did Not Abuse Its Discretion In Denying Respondents' Request For A Hearing To Examine IRS Agents

Traditionally, the broad testimonial obligation codified in provisions like Section 7602 is limited only by determinations of relevance and privilege. Respond-

ents have not argued that the information the IRS seeks to obtain through the summonses is irrelevant to the Service's duty "to make the inquiries, determinations, and assessments of all taxes" imposed by the Internal Revenue Code. 26 U.S.C. 6201(a). Nor have they contended that the summonses seek information irrelevant to "ascertaining the correctness of any return, * * * determining the liability of any person for any internal revenue tax * * *, or collecting any such liability." 26 U.S.C. 7602(a).

Respondents also do not assert any claim of privilege beyond the right of taxpayers not to accede to a government request for information that is pursued for an improper purpose. In order to obtain an opportunity to examine IRS officials, a taxpayer need not develop evidence sufficient to *prove* that the IRS has issued a summons for an improper purpose. But if a taxpayer cannot develop sufficient evidence from which at least an inference of possible wrongdoing might arise, "then an evidentiary hearing would be a waste of judicial time and resources," and a district court need not indulge such waste. *Kis*, 658 F.2d at 540.

In this case, the district court concluded that respondents had failed to present any evidence from which a reasonable trier of fact could infer that the IRS had issued these summonses for an improper purpose. Pet. App. 13a-19a. That conclusion fully justified the court's denial of respondents' request to inquire into the motives of individual IRS agents.[4]

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[4] In addition to concluding that respondents had failed to put forth any evidence to support their allegations, the district court held that, even if respondents' contentions had been factually supported, they would have failed as a matter of law to establish an

District courts already protect taxpayers against abusive summons practices by (a) requiring the IRS to establish (by demonstrating the *Powell* factors) that it issued a summons in good faith, and (b) allowing a taxpayer to present valid objections at an adversary hearing. A district court may also permit a summons opponent to examine IRS officials if the court finds reason to believe, notwithstanding the IRS's representation that it has satisfied the *Powell* factors, that a summons was issued for an improper purpose. The Eleventh Circuit has gone a substantial step further, however, by *requiring* district courts to permit such examinations whenever a summons opponent alleges bad faith. That approach subverts the presumption of regularity of government action and thereby distorts the balance that Congress sought to strike. The delay that would predictably flow from that requirement is not what Congress intended, and it is inconsistent with this Court's recognition that summons proceedings should be "summary in nature." See *Stuart*, 489 U.S. at 369 (quoting *1982 Senate Report* 285).

Affording discretion to district courts to decide whether to allow examination of IRS officials strikes the proper balance between preserving the summary nature of summons proceedings and protecting the

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improper purpose. Pet. App. 14a-19a. That alternative holding is supported by this Court's decision in *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310 (1985). In sustaining the district court's decision not to hold an evidentiary hearing, the Court in *Tiffany Fine Arts* explained that "the burden of showing an abuse of the court's process is on the taxpayer," *id.* at 324 n.7 (quoting *Donaldson*, 400 U.S. at 527), and it concluded that the allegation of improper purpose made in that case, "[e]ven if factually true, * * * did not provide a basis for quashing the summonses," *ibid.*

interests of taxpayers. Under the Eleventh Circuit's rule, by contrast, a taxpayer may delay the resolution of summons-enforcement proceedings merely by alleging that the summons was issued for an improper purpose. Requiring district courts to permit the examination of IRS officials in response to such bare allegations would have a recurring detrimental effect on the IRS's efficient enforcement of the federal tax laws.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 2014

STATUTORY APPENDIX

1. 26 U.S.C. 6201(a) (Supp. V 2011) provides in pertinent part:

Assessment authority

(a) Authority of Secretary

The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law.

* * * * *

2. 26 U.S.C. 7601(a) provides:

Canvass of districts for taxable persons and objects

(a) General rule

The Secretary shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

3. 26 U.S.C. 7602 provides:

Examination of books and witnesses

(a) Authority to summon, etc.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(b) Purpose may include inquiry into offense

The purposes for which the Secretary may take any action described in paragraph (1), (2), or (3) of subsec-

tion (a) include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

(c) Notice of contact of third parties

(1) General notice

An officer or employee of the Internal Revenue Service may not contact any person other than the taxpayer with respect to the determination or collection of the tax liability of such taxpayer without providing reasonable notice in advance to the taxpayer that contacts with persons other than the taxpayer may be made.

(2) Notice of specific contacts

The Secretary shall periodically provide to a taxpayer a record of persons contacted during such period by the Secretary with respect to the determination or collection of the tax liability of such taxpayer. Such record shall also be provided upon request of the taxpayer.

(3) Exceptions

This subsection shall not apply—

(A) to any contact which the taxpayer has authorized;

(B) if the Secretary determines for good cause shown that such notice would jeopardize collection of any tax or such notice may involve reprisal against any person; or

(C) with respect to any pending criminal investigation.

(d) No administrative summons when there is Justice Department referral

(1) Limitation of authority

No summons may be issued under this title, and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person.

(2) Justice Department referral in effect

For purposes of this subsection—

(A) In general

A Justice Department referral is in effect with respect to any person if—

(i) the Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws, or

(ii) any request is made under section 6103(h)(3)(B) for the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person.

(B) Termination

A Justice Department referral shall cease to be in effect with respect to a person when—

(i) the Attorney General notifies the Secretary, in writing, that—

(I) he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws,

(II) he will not authorize a grand jury investigation of such person with respect to such an offense, or

(III) he will discontinue such a grand jury investigation,

(ii) a final disposition has been made of any criminal proceeding pertaining to the enforcement of the internal revenue laws which was instituted by the Attorney General against such person, or

(iii) the Attorney General notifies the Secretary, in writing, that he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws relating to the request described in subparagraph (A)(ii).

(3) Taxable years, etc., treated separately

For purposes of this subsection, each taxable period (or, if there is no taxable period, each taxable event) and each tax imposed by a separate chapter of this title shall be treated separately.

(e) Limitation on examination on unreported income

The Secretary shall not use financial status or economic reality examination techniques to determine the existence of unreported income of any taxpayer unless the Secretary has a reasonable indication that there is a likelihood of such unreported income.

RESPONDENT'S BRIEF

RECORD AND BRIEFS

No. 13-301

Supreme Court, U.S.
FILED
MAR 17 2014
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

MICHAEL CLARKE, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Under *United States* v. *Powell*, 379 U.S. 48 (1964), an individual or entity that receives an IRS summons is entitled to the opportunity to show, at an adversary hearing, that the summons should be quashed because judicial enforcement of the summons would constitute an abuse of the court's processes—including, for example, if the summons was issued by the IRS for an improper purpose.

The question presented is whether the court of appeals erred in ruling, on the facts of this case, that in light of respondents' substantial allegations that the IRS had issued summonses to them for an improper purpose, respondents should have a limited evidentiary hearing at which they may examine IRS officials about the purpose for which the summonses were issued.

CORPORATE DISCLOSURE STATEMENT

Dynamo Holdings Limited Partnership is a limited partnership whose general partner is Dynamo Holdings, Inc. No publicly held company holds 10% or more of the stock in Dynamo Holdings, Inc.

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IN THE

Supreme Court of the United States

No. 13-301

UNITED STATES OF AMERICA,

Petitioner,

v.

MICHAEL CLARKE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

INTRODUCTION

This Court has repeatedly recognized that a party summoned by the Internal Revenue Service to produce documents or testimony is entitled to an adversary hearing before a federal district court at which it can challenge enforcement of the summons on the ground that it is being used for an improper purpose.[1] *See, e.g.*,

[1] In investigating a taxpayer's liability, the IRS is authorized to issue summonses to parties other than the taxpayer as well; for simplicity, this brief refers to all summoned parties as "the taxpayer." The government has never suggested that the standard for an evidentiary hearing differs depending on the identity of the summoned party.

United States v. *Powell*, 379 U.S. 48, 58 (1964). The government, however, would reduce this important safeguard against abuse of the summons process to an empty formality. In the government's view, as long the IRS submits a *pro forma* affidavit to the court asserting that it is acting properly, the court should enforce the summons—unless the taxpayer manages to produce its own affirmative evidence that refutes the government's attestation of good faith. In the government's view, a taxpayer generally has no right even to question the IRS about the purpose of the summons, even where (as here) it can point to circumstances that raise a substantial inference that the IRS is proceeding improperly.

The government's approach would render the right to an adversary hearing meaningless. Evidence of bad faith will almost always be exclusively in the possession of the government. For that reason, several courts of appeals have concluded that a taxpayer that makes a plausible allegation of IRS bad faith should have the opportunity for a limited evidentiary hearing—likely to last no more than a couple of hours—at which it can examine an IRS representative about the purpose of the summons. This approach—which originates in a proposal first made by the IRS itself—properly balances the taxpayer's rights against the government's legitimate interest in expeditious enforcement of its investigative summonses and ensures that summons enforcement proceedings are meaningful, while remaining summary in cases where the taxpayer fails to raise questions as to the IRS's good faith.

Under this standard, the judgment should be affirmed. Respondents have made a substantial allegation, bolstered by the evidence they were able to muster, that the IRS was using the summonses to gain an

unfair advantage in Tax Court litigation in circumvention of Tax Court rules and to retaliate against the taxpayer for refusing to extend the statute of limitations a *third* time. That was sufficient for an evidentiary hearing to allow respondents to make their case. Indeed, even under the more demanding standard applied in some circuits, respondents' showing was sufficient for an evidentiary hearing. And this is not a case in which a taxpayer or summoned party seeks a hearing based on unsupported, implausible, or speculative assertions of IRS mistreatment. Nor did the court of appeals purport to rule that hearings would be required in such circumstances. Rather, under *Powell*, where a taxpayer makes a plausible allegation of an improper purpose or bad faith on the part of the IRS, it should have the opportunity to establish those claims at an adversary hearing at which an IRS representative can be questioned.

STATEMENT

1. The IRS conducted an examination of the tax returns of respondent Dynamo Holdings Limited Partnership ("DHLP") for the tax years 2005-2007. Pet. App. 11a. Although the IRS normally has three years in which to examine and definitively fix a taxpayer's tax liability, *see* 26 U.S.C. §§ 6229, 6501, the IRS's examination of DHLP continued well into 2010, aided by DHLP's agreement to extend that limitations period twice so that the IRS's investigation of tax years 2005 and 2006 remained timely.

On August 11, 2010, as the extended limitations period drew to a close, the investigating IRS agent, Mary Fierfelder, signed a Final Partnership Administrative Adjustment ("FPAA") which set forth the IRS's position as to DHLP's tax liability for 2005-2007. JA 68. As

the name suggests, an FPAA represents the IRS's "final" position as to the taxpayer's liability. *See Sealy Power, Ltd.* v. *Commissioner*, 46 F.3d 382, 385-386 (5th Cir. 1995) ("[T]he FPAA ... serve[s] to notify affected taxpayers that the Commissioner has made a final administrative determination of their liability for particular tax years."); *see also* 26 U.S.C. §§ 6221-6223 (discussing partnership returns, and identifying the FPAA as marking the "completion" of administrative proceedings). Once the IRS issues an FPAA, the taxpayer can seek judicial review of the IRS's determination in Tax Court, and the matter then shifts from the administrative sphere to the courtroom. The IRS's own Summons Handbook makes clear that, once a taxpayer's liability has been finally determined, "the examination has been concluded," and "[t]he Service should no longer be in the process of gathering the data to support a determination[.]" JA 119 (Handbook § 25.5.4.4.8).[2]

When the IRS requested that DHLP agree to extend the limitations period for tax years 2005-2007 for a *third* time, DHLP declined. JA 51.[3] Shortly thereafter, in September and October 2010—and despite having signed the FPAA and not having asked for additional information for some time—Agent Fierfelder issued

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[2] The quoted passage of the Handbook discusses statutory notices of deficiency ("SND"), not FPAAs. But as the government acknowledges, an FPAA serves the same purpose for partnerships as the SND does for individuals. Pet. 5; *see also Sealy Power*, 46 F.3d at 385-386 (noting the functional equivalence of FPAAs and SNDs).

[3] Docket Entry ("DE") refers to the district court's docket in the lead case, *United States* v. *Clarke*, No. 11-mc-80456 (S.D. Fla.), unless otherwise noted. *See* JA 9 (designating *Clarke* as lead case and requiring motions and other papers to be filed in lead case only).

investigative summonses pursuant to 26 U.S.C. § 7602 to six additional people connected to DHLP, five of whom are respondents here. JA 35-36, 45; *see also* Pet. App. 11a, 21a, 32a, 43a, 54a.[4] Those summonses called for the production of documents and testimony regarding DHLP's 2005-2007 tax returns. The summonses had return dates of October 25, 2010, for four of the summoned respondents (JA 35-36; Pet. App. 11a, 21a, 32a, 43a) and December 3, 2010, for respondent Robert Julien (Pet. App. 54a). Those five respondents declined to comply with the summonses. Pet. App. 11a-12a, 21a-22a, 32a-33a, 43a-44a, 54a-55a. The sixth summoned person, Christine Moog, initially refused to comply with her summons, but ultimately complied and was interviewed in September 2011. JA 98-99 ¶ 7.

On December 28, 2010, with three days remaining in the statutory limitations period, the IRS issued—unaltered—the FPAA signed by Agent Fierfelder in August 2010. JA 60.

2. On February 1, 2011, DHLP commenced a proceeding in the United States Tax Court challenging the FPAA. JA 57; *see also* 26 U.S.C. § 6226(a). The Tax Court imposes significant limitations on the scope of discovery available to both the taxpayer and the government. *See* Tax Court Rule 70(a) ("Discovery is not available under these Rules through depositions except

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[4] The respondents who received IRS summonses in 2010 are Michael Clarke, as Chief Financial Officer of Beekman Vista, Inc.; Michael Clarke, as Chief Financial Officer of Dynamo GP, Inc.; Rita Holloway, as trustee for the 2005 Christine Moog Family Delaware Dynasty Trust; Marc Julien, as trustee for the 2005 Robert Julien Delaware Dynasty Trust; and Robert Julien. *See* Pet. App. 10a, 20a, 31a, 42a, 53a. The sixth respondent in this Court is DHLP itself, which was permitted to intervene in the summons enforcement proceeding. JA 8.

to the limited extent provided in Rule 74."). In particular, the Tax Court treats non-consensual depositions as "an extraordinary method of discovery." Tax Court Rule 74(c)(B).

3. On April 28, 2011, six months after the return date for most of the summonses, and almost three months after DHLP commenced its suit in Tax Court, the IRS instituted a proceeding in district court for enforcement of the summonses. JA 19; *see also* Pet. App. 10a, 20a, 31a, 42a, 53a; 26 U.S.C. § 7402 (authorizing district courts to hear summons enforcement proceedings). Respondents contended that, under *United States* v. *Powell*, 379 U.S. 48 (1964), enforcement should be denied and the summonses quashed because they had not been issued and were not being enforced for a proper investigative purpose.[5] Consistent with Eleventh Circuit precedent, respondents requested an evidentiary hearing at which they could inquire into and make a record about the government's purpose in issuing and enforcing the summonses.[6] They also asked for pre-hearing discovery.[7]

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[5] *See* JA 46-56; *United States* v. *Clarke*, No. 11-mc-80457 (S.D. Fla.), DE 14; *United States* v. *Holloway*, No. 11-mc-80459 (S.D. Fla.), DE 10; *United States* v. *Julien*, No. 11-mc-80460 (S.D. Fla.), DE 12; *United States* v. *Julien*, No. 11-mc-80461 (S.D. Fla.), DE 7 (responses to motion to enforce); Pet. App. 64a-84a (motion for summary dismissal).

[6] JA 54; *Clarke*, No. 11-mc-80457, DE 14, at 7; *Holloway*, No. 11-mc-80459, DE 10, at 9; *Julien*, No. 11-mc-80460, DE 12, at 9; *Julien*, No. 11-mc-80461, DE 7, at 7; Pet. App. 65a, 71a-75a.

[7] JA 54; *Clarke*, No. 11-mc-80457, DE 14, at 7; *Holloway*, No. 11-mc-80459, DE 10, at 9; *Julien*, No. 11-mc-80460, DE 12, at 9; *Julien*, No. 11-mc-80461, DE 7, at 7; Pet. App. 65a, 71a-75a.

Respondents offered several specific and substantial allegations suggesting that the IRS may have issued and sought enforcement of the summonses for improper reasons. They alleged that the summonses had been issued as retribution for DHLP's refusal to grant a third extension of the applicable statute of limitations.[8] Respondents also alleged that the IRS was abusing the district court's processes by enforcing the summonses for the purpose of circumventing the Tax Court restrictions on discovery.[9] Respondents did not rest on bare allegations, but rather supported these allegations with the competent evidence available to them in the absence of an evidentiary hearing or discovery. For example, they submitted a declaration from respondent Michael Clarke, who confirmed that the summonses were issued "immediately" after DHLP refused to extend the limitations period. JA 95 ¶ 9; *Clarke*, No. 11-mc-80457, DE 15 ¶ 9; *Julien*, No. 11-mc-80461, DE 8 ¶ 9; Pet. App. 73a. And they submitted a declaration from attorney Richard Sapinski, who represented Christine Moog when she appeared in compliance with her IRS summons, and who stated that Moog's interview by the IRS was conducted exclusively

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[8] JA 51-52; *Clarke*, No. 11-mc-80457, DE 14, at 5; *Holloway*, No. 11-mc-80459, DE 10, at 6; *Julien*, No. 11-mc-80460, DE 12, at 6; *Julien*, No. 11-mc-80461, DE 7, at 5; Pet. App. 72a-75a.

[9] JA 48, 52-53; *Clarke*, No. 11-mc-80457, DE 14, at 6-7; *Holloway*, No. 11-mc-80459, DE 10, at 7-8; *Julien*, No. 11-mc-80460, DE 12, at 7-8; *Julien*, No. 11-mc-80461, DE 7, at 6-7; Pet. App. 72a-75a. Respondents further alleged that the summonses had been issued as a subterfuge to gather information about another entity, for which the IRS had already completed the examination process for the pertinent years. JA 51; *Clarke*, No. 11-mc-80457, DE 14, at 4-5; *Holloway*, No. 11-mc-80459, DE 10, at 5-6; *Julien*, No. 11-mc-80460, DE 12, at 5-6; *Julien*, No. 11-mc-80461, DE 7, at 4-5; Pet. App. 72a-75a.

by the two attorneys representing the IRS in the Tax-Court proceeding and that Agent Fierfelder did not even attend. JA 100 ¶¶ 11-13.

Respondents also submitted several filings from the Tax Court case supporting their contention that the IRS was using the summonses not to assist the IRS in the administrative process of determining DHLP's tax liability, but rather as an improper form of discovery for the Tax Court litigation. For instance, the IRS refused to consent to referral of the Tax Court proceeding to IRS Appeals (a process similar to mediation) on the ground that the case is not "fully factually developed" due to respondents' noncompliance with the summonses "issued during the exam of [DHLP]." JA 102. The IRS also opposed DHLP's motion for a protective order in Tax Court, in part because the respondents had declined to comply with the summonses. DE 20-4 (Ex. D) ¶ 8. And the IRS sought a continuance of the Tax Court case on the ground that the summonses were outstanding. JA 105-106 ¶ 6.

Respondents further pointed to the IRS's own Summons Handbook, which, as noted, disapproves of the issuance of summonses once a final determination of tax liability has been made. JA 119 ¶ 3. Respondents argued that the IRS's conduct in this case constituted a departure from the principles recognized in the Handbook and that this departure was suggestive of the IRS's improper purpose in issuing the summonses. Pet. App. 68a-72a.

4. The district court denied the motions to quash the summonses and ordered enforcement. Pet. App. 19a, 29a, 40a, 51a, 62a. The court concluded that the respondents had made only a "naked assertion" that the summonses had been issued in retaliation for

DHLP's refusal to extend the limitations period. *Id.* 14a; 24a; 35a; 46a; 57a. It further concluded that even if the IRS was retaliating against respondents, that had "no bearing" on whether the summonses should be enforced. *Id.* 14a-15a; 24a-25a; 35a-36a; 46a-47a; 57a-58a. The district court also held, primarily on the basis of an out-of-circuit case, that as a matter of law, use of the summons process to avoid limits on discovery in Tax Court would not constitute grounds for quashing a summons. *Id.* 15a, 25a, 36a, 47a, 58a.

5. The court of appeals reversed in part, in a per curiam, unpublished decision. Applying the controlling Eleventh Circuit standard from *Nero Trading, LLC* v. *U.S. Department of Treasury, IRS*, 570 F.3d 1244, 1249 (11th Cir. 2009), the court concluded that respondents should have a limited evidentiary hearing at which they can seek to establish the IRS's bad faith. Pet. App. 5a. The court reached this conclusion after a "careful review of the record" revealed that the respondents had plausibly alleged an improper purpose behind the issuance of the summonses. *Id.* 3a. On that basis, the court directed that the respondents should be afforded an opportunity to examine IRS officials regarding the IRS's purpose in issuing the summonses. *See id.* 6a. The court denied, however, respondents' request for pre-hearing discovery. *Id.* 5a n.3.

SUMMARY OF ARGUMENT

While the IRS has broad authority to issue investigative summonses, it does not have unilateral authority to enforce those summonses. Rather, Congress has decided to interpose the judiciary as a check on potential abuse of the IRS's summons power, giving the district courts exclusive jurisdiction over summons enforcement. Because it is the courts' process that is invoked

to enforce a summons, courts have an independent duty to assure themselves that IRS summonses are issued and enforced in good faith. The courts have long recognized that the adversary process plays an essential role in helping the courts fulfill their function as a judicial bulwark against abusive summons processes. Thus, as this Court observed in *Powell*, 379 U.S. at 58, the adversary hearing to which the taxpayer is entitled must be meaningful, even though the summons enforcement proceeding itself should be streamlined.

Despite this Court's repeated recognition that the taxpayer is entitled to a meaningful adversary hearing, the government now seeks to transform summons enforcement into an *ex parte* affair, in which the IRS need only make a *pro forma* showing of its good faith. Under the IRS's preferred approach, the taxpayer would not receive an evidentiary hearing at which it could challenge the IRS's attestations of its good faith unless the taxpayer first could provide evidence of its own of the IRS's bad faith. The circular burden the IRS would impose on the taxpayer is inconsistent with a meaningful right to an adversary hearing.

The limited evidentiary hearing that was granted to respondents by the Eleventh Circuit is consistent with both this Court's guidance as to the type of hearing required and the recognition that summons enforcement proceedings should remain summary. If the taxpayer makes a plausible allegation of bad faith, it should be entitled to an evidentiary hearing at which it can question an IRS representative about the purposes underlying the summons. This approach is flexible enough to alleviate any concerns that taxpayers might allege frivolous claims in an effort to engage in a fishing expedition; that the IRS will be subjected to burdensome or intrusive inquiries; or that protracted proceed-

ings will thwart the tax collection process. In fact, in the circuits that have implemented such an approach (including the Eleventh Circuit), there is no suggestion that district courts are not entirely capable of managing these truncated adversary hearings. This procedure does not speak to whether the government is presumed to have acted properly; it simply allows the taxpayer an opportunity to overcome that presumption. And it is consistent with the procedures that have been adopted to address circumstances when grand juries are alleged to have issued a subpoena for an improper purpose.

In any event, the respondents here did not rely on speculative assertions, but instead compiled evidence at least suggesting that the IRS was acting improperly. That evidence indicated that the government pursued the summonses not to further an administrative *investigation* into tax liability, but to gain an advantage in *litigation* against the taxpayer, in circumvention of Tax Court discovery rules. And there is likewise circumstantial and affidavit evidence suggesting that the summonses were issued with retaliatory intent. In light of the evidence respondents submitted, the Eleventh Circuit properly required the district court to provide them with the limited relief of an adversary hearing.

ARGUMENT

I. A TAXPAYER CHALLENGING A SUMMONS IS ENTITLED TO A LIMITED EVIDENTIARY HEARING UPON MAKING PLAUSIBLE ALLEGATIONS THAT ENFORCEMENT WOULD CONSTITUTE AN ABUSE OF THE COURT'S PROCESS

A. Taxpayers Are Entitled To A Meaningful Check Against Abusive Summons Enforcement, Including An Adversary Hearing

Although Congress has authorized the IRS to issue investigative summonses, it has never allowed the IRS to enforce its own demands that taxpayers produce documents and testimony. Rather, in recognition of the fact that the summons power can be abused for harassment and other improper purposes, Congress has interposed the judiciary as a check against misuse of the summons process. *See* 26 U.S.C. § 7604; *see also United States* v. *Bisceglia*, 420 U.S. 141, 146 (1975) ("[T]he authority vested in tax collectors may be abused, as all power is subject to abuse."); *cf. Oklahoma Press Publ'g Corp.* v. *Walling*, 327 U.S. 186, 213 (1946) ("Officious examination can be expensive, so much so that it eats up men's substance. It can be time consuming, clogging the processes of business. It can become persecution when carried beyond reason."). To obtain enforcement of a summons, the IRS must establish before an impartial judge that the summons process is being used for a proper purpose. *See United States* v. *Powell*, 379 U.S. 48, 57-58 (1964).

The judicial check against misuse of the IRS summons process accords with a deeply engrained tradition of denying Executive Branch agencies authority to enforce their own subpoenas. "Congress has consistently required that agencies and departments seek enforce-

ment of administrative subpoenas through a federal district court." Dep't of Justice, *Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities* ("*DOJ Report*") Part II.A.2, *available at* http://www.justice.gov/archive/olp/rpt_to_congress.htm (last visited Mar. 17, 2014). This requirement is rooted in the recognition that "[b]ifurcation of the power, on the one hand of the agency to issue subpoenas and on the other hand of the courts to enforce them, is an inherent protection against abuse of subpoena power." *Id.* (internal quotation marks omitted) (alteration in original); *see also FEC* v. *Florida for Kennedy Comm.*, 681 F.2d 1281, 1283-1284 (11th Cir. 1982) ("In granting the exclusive power to enforce administrative subpoenas to the federal courts, Congress manifested its intention that the courts exercise independent judgment in evaluating agency subpoenas."); *SEC* v. *Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 123-124 (3d Cir. 1981) ("Congress has entrusted the enforcement of the administrative process for the production of witnesses and papers to the courts.").

In keeping with Congress's intent that judicial review of summonses serve as a check against Executive Branch overreach, the courts have long recognized that "[t]he system of judicial enforcement is designed to provide a *meaningful* day in court for one resisting an administrative subpoena." *DOJ Report* Part II.A.2. (emphasis added, internal quotation marks omitted, alteration in original); *see Wheeling-Pittsburgh Steel Corp.*, 648 F.2d at 123-124 ("[F]ederal courts have never lent their enforcement machinery to an executive branch investigative body in the manner of a rubber stamp." (internal quotation marks omitted)); *Wearly* v. *FTC*, 616 F.2d 662, 665 (3d Cir. 1980) ("We start with

the basic premise that a subpoena from the FTC is not self-enforcing.... In acting on that petition the district court's role is not that of a mere rubber stamp, but of an independent reviewing authority called upon to insure the integrity of the proceeding."); *United States* v. *Security State Bank & Trust*, 473 F.2d 638, 642 (5th Cir. 1973) ("[U]nless the district court measures the Secretary's subpoena against the two statutory standards and declines to enforce the subpoena if it is in excess of the Secretary's statutory power, the enforcement proceeding will become an empty form; and the court, a rubber stamp[.]"). As this Court recognized in *Powell*, because "[i]t is the court's process which is invoked to enforce the administrative summons," the court has a duty to deny enforcement that would "permit its process to be abused." 379 U.S. at 58; *see also* U.S. Br. 18 ("Before enforcing an IRS summons, a district court must *assure itself* that the summons" is proper. (emphasis added)).

For the judiciary to fulfill its function of safeguarding against abusive summonses, it cannot be entirely dependent on one-sided submissions by the government attesting in conclusory fashion that its summons is being pursued for a proper purpose. Rather, as this Court has long recognized, the adversarial process plays an essential role in bringing facts to light—and when that process is not meaningfully employed, there is an "increased chance of error." *Lankford* v. *Idaho*, 500 U.S. 110, 127 (1991); *see United States* v. *Nobles*, 422 U.S. 225, 230 (1975) ("[W]e have placed our confidence in the adversary system, entrusting to it the primary responsibility for developing relevant facts[.]").

Accordingly, this Court has repeatedly emphasized that a taxpayer should have the opportunity for an "ad-

versary hearing" to test whether the IRS is seeking to abuse the district court's process through improper enforcement of a summons. *See Donaldson* v. *United States*, 400 U.S. 517, 527 (1971) (referring to "the adversary hearing to which the taxpayer is entitled before enforcement is ordered"); *Powell*, 379 U.S. at 58 (process for summons enforcement should "not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered"); *Reisman* v. *Caplin*, 375 U.S. 440, 446 (1964) (noting that an enforcement proceeding under Section 7402(b) is an "an adversary proceeding affording a judicial determination of the challenges to the summons"). The IRS cannot obtain summons enforcement through a mere *ex parte* submission attesting to its good faith; instead, "the Federal Rules of Civil Procedure apply" to summons enforcement proceedings, and "[t]he proceedings are instituted by filing a complaint, followed by answer and hearing." *Powell*, 379 U.S. at 58 n.18. Through this process, taxpayers are given the opportunity to test the government's assertion of good faith, and courts are not forced to rely only on a self-serving and often barebones submission before lending their imprimatur to enforcement of a summons.

B. The Government's Approach Would Effectively Transform Summons Enforcement Into An *Ex Parte* Proceeding

Despite this Court's repeated emphasis that taxpayers are entitled to challenge summons enforcement at an adversary hearing, the government argues that taxpayers are entitled to nothing more than the opportunity to "present any evidence in their possession that would impugn the Service's good faith." Br. 9-10; *id.* at 21 (hearing only appropriate when "pre-existing evi-

dence raises an inference of improper purpose"). In the government's view, taxpayers are not entitled to any process by which the government may be compelled to explain the purpose for the issuance and enforcement of the summons, and even if information within the government's possession would establish that the summonses were abusive, a taxpayer who cannot prove that fact on its own can never make its case.

The government's argument drains the adversary hearing foreseen by this Court in *Powell* of all meaning. *Powell* made clear that a summons that might appear proper on its face nonetheless should not be enforced if it was issued "to harass the taxpayer or to put pressure on him to settle a collateral dispute," or for some other improper purpose. 379 U.S. at 58. But in the great majority of circumstances, evidence of whether a summons has been pursued in good faith and should be enforced is "peculiarly within the knowledge or files of the Service." *United States* v. *Security Bank & Trust Co.*, 661 F.2d 847, 850 (10th Cir. 1981). And correspondingly, the taxpayer will almost always lack access to the evidence needed to establish the IRS is acting in bad faith. The government's proposed rule, which would require the taxpayer to produce its own significant affirmative evidence before even being allowed to question the IRS, would result in "an unreasonable circular burden on the taxpayer: the facts that he must show to obtain discovery are only available through discovery." *United States* v. *Southeast First Nat'l Bank of Miami Springs*, 655 F.2d 661, 667 (5th Cir. 1981).[10]

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[10] *See also United States* v. *Kis*, 658 F.2d 526, 540 (7th Cir. 1981) (noting "we do not want to put the taxpayer in the anomalous position of having to allege specific facts when he has no means to gather that information through discovery"); *United*

The right to a hearing on that question is therefore meaningless unless the taxpayer is afforded some opportunity to inquire into the IRS's purpose for issuing the summons. "[W]here a summonee raises colorable allegations of an improper purpose and seeks to prove those allegations, the enforcement court must afford the summonee at least some opportunity to substantiate its allegations. To rule otherwise ... would render it virtually impossible for a summonee to prove that a facially valid summons was, in fact, issued for an improper purpose." *See FEC* v. *Committee to Elect Lyndon La Rouche*, 613 F.2d 849, 862 (D.C. Cir. 1979) (citations omitted).[11]

Indeed, the government never disputes that the IRS will usually be in exclusive possession of the evidence that would be necessary to establish that it had acted in bad faith. *See* Br. 19 (quoting, but not challenging, the Eleventh Circuit's characterization of the burden that the government asks the taxpayer to bear as circular). The government thus implicitly recognizes that if taxpayers cannot challenge summonses unless they already possess evidence of the government's bad

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States v. *Stuckey*, 646 F.2d 1369, 1373-1374 (9th Cir. 1981) ("We recognize the anomaly of placing a burden of proof upon the taxpayer and then denying access to what may be the very information needed to meet that burden.").

[11] This Court has recognized that procedural rules should be tailored in view of the parties' differing access to evidence. *See, e.g.*, *Campbell* v. *United States*, 365 U.S. 85, 96 (1961) (noting "the ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary," and structuring procedure to avoid "unfairly severe burden" where defendant was in need of access to information and the government had superior access to the relevant witness).

faith, few if any will ever be able to meaningfully exercise their right to challenge the IRS's summons enforcement. In practice, the IRS's initial declaration of good faith would almost always be dispositive and the government's submission would seldom be meaningfully tested. In the overwhelming majority of cases, the taxpayer's right to an adversary hearing would be effectively rendered meaningless, and IRS's power would be left unchecked.

C. Allowing A Limited Evidentiary Hearing To Test Government Good Faith Strikes A Proper Balance And Does Not Unduly Burden The IRS Or Frustrate Enforcement Of The Tax Laws

In seeking to ensure that taxpayers have a meaningful opportunity to develop evidence of bad faith while preserving expeditious enforcement of the tax laws, several courts, including the Eleventh Circuit, have gravitated to the same solution: If a taxpayer makes plausible allegations of bad faith, it should have the opportunity for a limited evidentiary hearing at which it can question an IRS representative about the purpose of the summons, but it is not entitled to any further discovery unless the hearing casts doubt on the IRS's good faith.[12] This procedure strikes an appropriate balance by providing the taxpayer with a meaning-

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[12] *See Nero*, 570 F.3d at 1249 (ordering "a limited adversary hearing where the taxpayer may question IRS officials concerning the Service's reasons for issuing the summons"); *see also Southeast First Nat'l Bank*, 655 F.2d at 667; *United States* v. *Church of Scientology of Cal.*, 520 F.2d 818, 824 (9th Cir. 1975) (adopting the procedure that the taxpayer may question an IRS representative at a hearing); *United States* v. *Salter*, 432 F.2d 697, 701 (1st Cir. 1970) (instituting same procedure at government's urging).

ful opportunity to obtain information likely to be within the sole possession of the IRS, while avoiding significant burdens on the IRS.

This approach leaves room for the district courts to deny hearings to tax objectors or resisters who only assert conclusory, implausible, or speculative grounds that the government is acting in bad faith. It also gives the district court ample discretion to structure the adversary hearing so that the challenge to the summons can be heard in an expeditious and streamlined fashion. And it allows the district court to deny leave to undertake more extensive forms of discovery unless the hearing discloses a substantial basis for going forward.

1. The government raises a host of objections to this approach, none of which is persuasive, and all of which exaggerate the burden that it will place on tax enforcement. First, the government criticizes this approach as "reduc[ing] to zero the amount of evidence that is required to rebut a showing of good faith." Br. 9. But that contention conflates the issue of the ultimate burden of persuasion with the antecedent and narrower question of what burden the taxpayer must satisfy to secure a limited evidentiary hearing. Allowing the taxpayer to gather evidence that might rebut the government's assertion of good faith is not equivalent to finding that assertion of good faith to have been overcome. The court of appeals' decision in this case merely allows the taxpayer to enter the courthouse door; it does not dictate who leaves the court victorious.

The government also argues that under this approach, tax enforcement will be frustrated because any attempt to enforce a summons will be subject to "protracted inquir[ies]" into the IRS's operations. Br. 22. But the Eleventh Circuit—like other circuits who fol-

low a similar approach—has been quite clear that "the full 'panoply of expensive and time-consuming pretrial discovery devices'" is presumptively *not* available unless the taxpayer makes a sufficiently substantial showing of bad faith at the hearing. *See* Pet. App. 5a n.3 (quoting *Nero*, 570 F.3d at 1249). The limited evidentiary hearing serves as a screening mechanism that affords taxpayers a fair opportunity to develop their contentions, while shielding the government from any intrusive discovery or significant delay except in cases where the taxpayer has succeeded in raising doubts as to the government's good faith.[13]

The government's rather alarmist suggestion that this rule will "stultify [its] every investigatory move" (Br. 26 (internal quotation marks omitted)) is belied by the reality that the IRS has successfully operated under this regime for decades in several jurisdictions. Along with the Eleventh Circuit, the First, Fifth, and Ninth Circuits long ago ruled that a taxpayer may have an evidentiary hearing to test the IRS's good faith even if it does not have its own affirmative evidence establishing IRS bad faith. *See supra*, n.12. Other circuits

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[13] Thus, the government's reliance on *United States* v. *Armstrong*, 517 U.S. 456 (1996), is misplaced. In *Armstrong*, the lower court required the government to undertake a massive discovery obligation: compiling data regarding three years of cases. This can hardly be compared to the far less burdensome requirement of having the agent who issues a summons (or some other appropriate IRS representative) attend a single, limited hearing. Moreover, in *Armstrong*, this Court stressed that the criminal defendants in that case could themselves have developed evidence that would have supported their claim without unduly burdening the government. *Id.* at 470. Here, by contrast, the pertinent evidence is in the sole possession of the government.

follow similar rules.[14] For instance, the Sixth Circuit clarifies that a taxpayer must be afforded some "opportunity to substantiate his allegations." *United States* v. *Will*, 671 F.2d 963, 968 (6th Cir. 1982); *see also id.* (approvingly discussing *United States* v. *Joseph*, 75-1 USTC P 9369 (6th Cir. Feb. 25, 1975), which reversed a district court for cutting off cross-examination at an evidentiary hearing intended to afford the taxpayer an opportunity to substantiate allegations of bad faith).[15]

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[14] For a more extensive discussion of the approaches taken by each circuit, see Br. in Opp. 15-23.

[15] The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324, did not legislatively overrule any of these decisions. TEFRA provided that it is not an abuse of the summons power for the IRS to gather evidence that may support a criminal tax prosecution when it has not yet referred the matter for criminal prosecution. But TEFRA solely concerns the situation where an ongoing IRS *investigation* may legitimately have both a criminal and civil purpose; it says nothing about the IRS's effort to use summonses to gain an advantage in court litigation rather than to further an investigation, and it also says nothing about other forms of bad faith or the standard that should be employed to determine whether a taxpayer is entitled to a limited evidentiary hearing. *See* Joint Committee on Taxation, *Explanation of the Revenue Provisions of the Tax Equity and Fiscal Responsibility Act of 1982*, JCS-38-82 No. 8 (Dec. 31, 1982), *available at* 1982 WL 893228, at Part C.4.b (explaining the limited purpose of TEFRA was to simplify administration in cases with a criminal aspect); *United States* v. *Millman*, 822 F.2d 305, 308 (2d Cir. 1987) (addressing standard where IRS acts with some other form of "improper purpose"); *see also United States* v. *LaSalle Nat'l Bank*, 437 U.S. 298, 317 n.19 (1978) ("The *Powell* elements were not intended as an exclusive statement about the meaning of good faith."); *id.* at 318 n.20 ("These requirements are not intended to be exclusive."). No circuit has concluded that the cases discussed above and in the brief in opposition to certiorari were overruled by TEFRA, and those cases have been cited and relied upon

Indeed, the approach that would allow a limited evidentiary hearing (but presumptively deny other forms of discovery) to a taxpayer who plausibly alleges bad faith was first proposed by the government itself shortly after *Powell*. *See United States* v. *Salter*, 432 F.2d 697, 700 (1st Cir. 1970) (accepting the "suggestion, offered by the government," that upon an allegation of improper purpose, the court should proceed to a hearing at which the taxpayer who alleged improper purpose could question the agent who issued the summons, and then determine whether further discovery was warranted). The Eleventh Circuit's rule is directly derived from that proposal.[16] Thus, the rule below is not just *consistent* with the IRS's ability to enforce the tax law: It was *suggested* by the IRS in the first place. When the IRS was faced with the question of how to balance its interests in enforcement with preventing the abusive use of tax summonses it proposed the exact rule at issue here.

The government does not point to anything to suggest that tax enforcement has been unduly hindered in those circuits where limited evidentiary hearings have been allowed. The government gives insufficient credit to the management capabilities of the district courts, which are quite competent at structuring this process to ensure that tax collection is not delayed and that the

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after TEFRA. The government itself (at 12 n.2) cites pre-TEFRA cases.

[16] The Fifth Circuit explicitly adopted *Salter* in *United States* v. *Harris*, 628 F.2d 875, 883 (5th Cir. 1980) ("We sanction the procedure stated by the First Circuit in *Salter*."), and then followed *Harris* in *United States* v. *Southeast First National Bank of Miami Springs*, 655 F.2d 661 (5th Cir. 1981). *Nero* merely reaffirmed *Southeast*, and the decision below applied *Nero*.

IRS is not unduly burdened. Indeed, the local rules of at least one district mandate precisely this procedure, yet the government suggests no untoward consequences. *See* E.D. Pa. R. Civ. P. 4.1.2(d) (stating that "the Secretary or Secretary's delegate shall be prepared to prove the material allegations of the complaint" and providing that taxpayer shall have opportunity to rebut Secretary's contentions).

In practice, district courts have proven amply capable of ensuring that evidentiary hearings are appropriately streamlined. In the great majority of cases, the hearing is likely to last at most a few hours, and the presence of any given agent would likely be required for even less time. *See, e.g.*, *Miccosukee Tribe of Indians of Fla.* v. *United States*, 730 F. Supp. 2d 1344, 1354 (S.D. Fla. 2010), *aff'd*, 698 F.3d 1326 (11th Cir. 2012) (setting aside "approximately two hours" for limited evidentiary hearing on claims of bad faith and limiting each side to two witnesses in case involving bank records of tribally owned casino); *Southeast*, 655 F.2d at 663 (taxpayer suggested that he could present his case in "one to two hours."). Indeed, the Ninth Circuit has held that a required hearing was sufficient where the district court allowed the taxpayer to fully examine one issuing IRS agent and cut off his examination of the second issuing agent, in a hearing "possibly" conducted during "a luncheon recess of a busy District Court." *United States* v. *Stuckey*, 646 F.2d 1369, 1387 (9th Cir. 1981) (Wyatt, J. dissenting). Courts are in agreement that, as long as the taxpayer is "afforded an opportunity to substantiate his allegations ... the permissible scope of the hearing is a decision left to the discretion of the district court," and the taxpayer's right to cross-examination may be limited if it becomes apparent that

the taxpayer will be unable to raise any question as to the IRS's good faith. *Will*, 671 F.2d at 968.

The Eleventh Circuit, too, permits district courts to limit the scope of hearings, as demonstrated by its decision in *Nero*. There, the Eleventh Circuit upheld the enforcement of a summons against one of the taxpayers at issue, Ironwood Trading Co., because the district court "at least allowed" a "truncated" limited adversarial hearing. 570 F.3d at 1249; *see also id.* at 1250 (warning only against restrictions that would lead the hearings' utility to be "altogether frustrated"); *see also Southeast*, 663 F.3d at 667-668 (suggesting that the hearing is intended to allow taxpayers to obtain information that is "absolutely essential" to establish the taxpayer's theory of bad faith). The only limitation the Eleventh Circuit has placed on district courts' control over scope of such hearings is that a hearing may not be circumscribed to such an "extent that its utility is altogether frustrated." *Nero*, 570 F.3d at 1249. This is not an unfair or unreasonable burden to impose on the IRS, and will not meaningfully interfere with enforcement of the tax laws.

2. The government argues that it is wrong to allow every taxpayer who alleges bad faith—no matter how speciously—to have an evidentiary hearing at which it can cross-examine IRS officials. Br. 19. But that is not what the Eleventh Circuit has held,[17] and this case—

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[17] Contrary to the government's persistent statements, the court of appeals did not adopt such an unqualified rule. *Nero*—which is the Eleventh Circuit's last published decision on point—explicitly states that an evidentiary hearing need not be conducted in every case. *See* 570 F.3d at 1249 (explaining that the court's ruling does not "categorically strip district courts of their discretionary power to determine whether an adversarial hearing is appropriate"). Instead, consistent with *Powell*'s promise that tax-

where the taxpayer has plausibly raised a substantial question about the government's good faith—does not require any such rule for the taxpayer to obtain a hearing. The question, rather, is under what circumstances district courts must provide at least *some* limited opportunity for taxpayers to question an IRS representative about the agency's good faith.

A taxpayer should have the opportunity for such an evidentiary hearing if it makes a *plausible* allegation of the agency's improper purpose. This standard—essentially the standard of *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009)—is consistent with *Powell*'s observation that summons enforcement proceedings are subject to the Federal Rule of Civil Procedure. *See Powell*, 379 U.S. at 58 n.18. That standard also serves to weed out the kinds of baseless assertions about IRS misconduct and delaying tactics that appear to concern the government. The district courts have developed extensive experience in applying the *Iqbal* standard of Federal Rule of Civil Procedure 8, and there is no reason to doubt that they can apply it in this context as well.

Moreover, that is, in essence, the standard that has long been applied in those circuits that have allowed

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payers will have a meaningful opportunity to challenge IRS summonses on "any appropriate ground," the Eleventh Circuit requires a hearing only when it would provide the sole realistic opportunity for a taxpayer to acquire evidence in support of his allegation of bad faith. *See id.* Although the decision below did not specifically address the circumstances under which a taxpayer's allegations are too insubstantial to warrant a hearing, it was unnecessary for the court of appeals to do so, given that this is clearly not such a case, and the decision below was an unpublished per curiam decision that followed and applied prior circuit decisions (including *Nero*) and did not purport to make new law in the circuit.

evidentiary hearings even when the taxpayer is unable to produce its own affirmative evidence of bad faith. In fact, the court of appeals in this case described the adequacy of respondents' allegations of bad faith by reference to "federal pleading standards." Pet. App. 5a; *see id.* (citing Fed. R. Civ. P. 8). Similarly, the Fifth Circuit required an evidentiary hearing when a taxpayer has placed "in issue" the IRS's good faith "in a substantial way." *Southeast*, 655 F.2d at 665-666; *see United States* v. *Harris*, 628 F.2d 875, 879 (5th Cir. 1980) (hearing not required where taxpayer did not "'raise in a substantial way the existence of substantial deficiencies in the summons procedure'"). *Cf. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d at 128 (allowing further discovery where summoned party demonstrates that allegations that the SEC was abusing the court's process were "non-frivolous"). By requiring a summoned party to challenge the government's good faith in "a substantial way," these cases appropriately balance the government's interest in avoiding unduly burdensome and frivolous litigation with citizens' rights to substantiate credible claims of government wrongdoing.[18]

Allowing taxpayers a realistic opportunity to substantiate non-frivolous, good-faith claims that they believe will have evidentiary support "strikes the appropriate balance between honoring the intended summary nature of the summons proceeding and protecting the interests of the taxpayer." *Nero*, 570 F.3d at 1250.

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[18] Other rules, such as Federal Rule of Civil Procedure 11, also provide additional checks against frivolous allegations of bad faith. *See* Fed. R. Civ. P. 11(b)(1) (attorney must certify that filing is not for "any improper purpose" including "to harass" or to "cause unnecessary delay"), 11(b)(3) (attorney must certify that contentions will "likely have evidentiary support after a reasonable opportunity for further investigation").

This rule will not "thwart and defeat" the IRS's investigatory powers. U.S. Br. 26 (internal quotation marks omitted). Rather, it provides a fair and balanced procedure to ensure those powers are deployed for legitimate ends.

D. The Government's Other Arguments Are Not Proper Grounds For Denying Taxpayers A Meaningful Opportunity To Challenge A Summons

The government argues that an opportunity for a hearing to test IRS good faith is incompatible with other legal rules, including decisions regarding other investigative bodies. Those arguments do not withstand scrutiny.

1. The government argues that the decision below is inconsistent with the presumption of good faith to which government actions are entitled. But the question here is not whether the government should be *presumed* to be acting properly, but rather, whether the taxpayer should be afforded any meaningful opportunity to overcome that presumption. *Powell* makes clear that the government's initial submission of good faith should "not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered." 379 U.S. at 58. Without any opportunity to obtain evidence exclusively in the hands of the IRS, taxpayers would for all practical purposes encounter an insurmountable obstacle to testing the government's (often boilerplate) assertions about its own good faith.

The government is doubtless correct that it would be improper for the court to "infer wrongdoing on the part of a government official based on a mere allegation" (Br. 22)—but the rule proposed here (which several courts have long applied) permits no such thing.

Instead, upon a plausible allegation of wrongdoing, it provides a limited mechanism through which the taxpayer may obtain basic evidence. If the hearing reveals no evidence of wrongdoing, then the summons is enforced. Moreover, the taxpayer bears the burden of demonstrating at the evidentiary hearing that further discovery is warranted. But the government asks for more. Its position is not merely that it should receive the benefit of the doubt, but that in practice it should be immune from questioning—and should therefore have unchecked latitude to require taxpayers submit to intrusive demands to produce documents and testimony based on nothing more than a pro forma recitation of its own good faith. This goes far beyond a presumption of regularity.

2. The government also argues that the Eleventh Circuit's rule is inconsistent with the treatment of grand jury subpoenas. This argument ignores the fact that courts have allowed challenges to grand jury subpoenas to go forward where it appears that the government is misusing the grand jury to gain a litigation advantage. It also ignores the structural distinctions between the grand jury and the IRS.

Courts have recognized that the grand jury subpoena power can be misused, and that improperly issued subpoenas should be quashed. For example, grand jury subpoenas may not be used to harass a target. *See United States* v. *Dionisio*, 410 U.S. 1, 12 (1972) ("[T]he Constitution could not tolerate the transformation of the grand jury into an instrument of oppression."); *In re Grand Jury Matters*, 593 F. Supp. 103, 107 (D.N.H. 1984) (quashing grand jury subpoena in part because it was "without doubt harassing"). Courts have also "universally recognized" that it is improper to use a grand jury subpoena to develop evidence for a

case in which the indictment has already been issued. Beale & Bryson, *Grand Jury Law and Practice* § 9:16 (2d ed. 2013) (collecting cases); *see infra*, p. 38 & n.24.

Courts take seriously their obligation to protect against misuse of grand jury subpoenas to gain a litigation advantage in the criminal trial—even though defendants who allege an improper purpose in the grand jury context seldom have access to direct evidence of wrongdoing. To accommodate this reality, courts will conduct hearings or review transcripts of the grand jury proceedings, to which the criminal defendant does not have access, to determine whether a grand jury subpoena has been misused and whether the defendant should be granted some form of relief as a result. *E.g.*, *United States* v. *Jenkins*, 904 F.2d 549, 559 (10th Cir. 1990) (lower court had conducted two "*in camera* hearings"); *United States* v. *Badger*, 983 F.2d 1443, 1458 (7th Cir. 1993) (district court "did review the grand jury materials *in camera*," although defendant had not offered "any evidence"); *United States* v. *Sellaro*, 514 F.2d 114, 122 (8th Cir. 1973) (court "ha[d] examined the grand jury transcript"); *In re Grand Jury Investigation*, 425 F. Supp. 717, 719 (S.D. Fla. 1977) (court elicited testimony from grand jury foreman to corroborate prosecutor's claimed proper purpose). When timing or circumstances suggest that a subpoena was issued solely to gather evidence of an already-charged crime, courts have imposed further requirements on the government; one district court, for instance, required the government to submit an affidavit and offer of proof demonstrating its proper purpose. *United States* v. *Finazzo*, 407 F. Supp. 1127, 1132 (E.D. Mich. 1975).[19]

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[19] The government relies (Br. 24-25) on *United States* v. *R. Enterprises, Inc.*, 498 U.S. 292 (1991), to suggest that, because

Thus, even in the grand jury context—where there is no requirement for an adversary hearing, and where unique considerations of secrecy preclude defendants from either substantiating their allegations or meaningfully participating in a hearing—courts have created procedures roughly analogous to the hearings at issue here. When there are substantial allegations that their process is being abused, courts regularly review the available evidence, at least to the extent consistent with the independence and secrecy to which grand jury proceedings are entitled. *See In re Grand Jury Proceedings*, 814 F.2d 61, 71 (1st Cir. 1987) ("Despite these difficulties, neither we nor other courts have shirked the responsibility of deciding the merits of challenges to grand jury proceedings like the one raised here.").

Moreover, there are particular reasons for concern about intrusion into the grand jury's processes that do not apply to an executive agency like the IRS. As this Court has recognized, "the whole theory of [the grand jury's] function is that it belongs to no branch of the in-

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grand jury subpoenas are generally presumed to be reasonable, courts may not give targets of such subpoenas any opportunity to develop evidence against their enforcement. But *R. Enterprises* stands for the opposite proposition; it noted that "a court may be justified in a case where unreasonableness is alleged in requiring the Government to reveal the general subject of the grand jury's investigation before requiring the challenging party to carry its burden of persuasion," because "[a]bsent even minimal information, the subpoena recipient is likely to find it exceedingly difficult to persuade a court that 'compliance would be unreasonable." *Id.* at 300, 302 (internal quotation marks omitted). In other words, in *R. Enterprises*, this Court recognized the unfairness that would arise if the subpoena's target would ultimately bear a heavy burden but had no access to critical information it would need to meet that burden, and it suggested that some accommodation for that reality would be in order.

stitutional Government, serving as a kind of buffer or referee between the Government and the people." *United States* v. *Williams*, 504 U.S. 36, 47 (1992); *see id.* at 48 (discussing the grand jury's "tradition of independence"); *United States* v. *Calandra*, 414 U.S. 338, 343 (1974) (noting grand jury's role as both a "body of accusers" and a "protector of citizens against arbitrary and oppressive governmental action"); *Dionisio*, 410 U.S. at 16-17 (explaining that the "constitutional guarantee" of a grand jury "presupposes an investigative body acting independently of either prosecuting attorney or judge" (internal quotation marks omitted)); *Stirone* v. *United States*, 361 U.S. 212, 218 (1960) ("The very purpose of the ... grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge"). By contrast, an executive agency like the IRS lacks the independence of the grand jury. It is for that reason that Congress has required a separate "buffer" between the IRS and the people. That buffer is supplied by adversary hearings at which taxpayers have a meaningful opportunity to establish that the government is acting pursuant to an improper purpose (or at least a basis for so inferring, and for further inquiry).

In this vein, the government's extensive reliance on *Dionisio* is misplaced. If anything, *Dionisio* highlights the distinctions between grand juries and executive agencies like the IRS. There, this Court rejected an argument that a grand jury must make an affirmative showing of "reasonableness" before its subpoenas will be enforced. In other words, the Court ruled that grand juries are not subject to an affirmative showing comparable to the showing that the Court required of the IRS in *Powell*. This is precisely because of the

grand jury's special constitutional role as an independent "protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor." *Dionisio*, 410 U.S. at 17. The government quotes *Dionisio*'s admonition that courts should be cautious to place procedural burdens on a grand jury. *See* Br. 24 (quoting 410 U.S. at 17). But the quoted language comes from a paragraph almost entirely devoted to underscoring the importance of the grand jury's independence from both the executive branch and the judiciary. Because of this independence, the Court explained, it is critical for grand juries to be "unhindered by external influence or supervision" to the greatest possible extent. 410 U.S. at 17. *Dionisio* does not control this situation, where—as this Court noted in *Powell*—Congress has specifically required court review to avoid executive agency abuse.

3. The government notes that courts have compared the IRS's investigative powers to similar powers of other agencies (Br. 23-24). For example, the government cites to the "power of inquisition" vested in the Federal Trade Commission ("FTC"). Br. 23. But the FTC's authority is quite different from that of the IRS. For one thing, the FTC, which has adjudicative powers, exercises continuing "jurisdiction" over the cases before it, while the IRS cedes jurisdiction to either the DOJ or the Tax Court after its investigative function is fulfilled. *See* FTC, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority* (July 2008), *available at* http://www.ftc.gov/about-ftc/what-we-do/enforcement-authority ("In the administrative process, the Commission makes the initial determination that a practice violates the law in either an adjudicative or rulemaking proceeding."). Thus, unlike the IRS, the FTC has no

incentive to use its investigative authority to circumvent the rules of another forum that assumes jurisdiction. Moreover, the FTC can require "compliance reports" because the FTC is charged with ensuring *ongoing* compliance with its own orders, and thus has a continuing responsibility to investigate. *See, e.g.*, 15 U.S.C. § 46(b); *FTC* v. *John Beck Amazing Profits, LLC*, 888 F. Supp. 2d 1006, 1016 (C.D. Cal. 2012) (FTC's proposed final judgment requiring defendants to file compliance reports for twenty years was justified in light of defendants' history of violations). The IRS's role, however, is retroactive only—it examines only past returns, set at a fixed point in time. Once the IRS has made a determination as to liability for a given period, its investigative role ceases, and it has no need to issue or enforce a summons related to that period.

In any event, the cases the government cites do not suggest any conflict with the Eleventh Circuit's approach—there is no dispute that one who challenges a subpoena must demonstrate why it should not be enforced. *See Oklahoma Press Publ'g Co.* v. *Walling*, 327 U.S. 186 (1946); *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950). The dispute here is simply about what opportunity taxpayers should have to meet their burden when the evidence they require is within the hands of the IRS. *See Nero*, 570 F.3d at 1250 (emphasizing that the taxpayer "normally has no knowledge" of the facts necessary to determine the IRS's purpose (quoting *Southeast*, 655 F.2d at 667)). The ultimate standard for *prevailing* on a challenge to a summons is not at issue.[20]

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[20] Throughout its briefing, the government relies on cases that establish the uncontested proposition that agency investigatory powers are often quite broad. *See, e.g.*, Br. 25-26 (discussing

II. Respondents Have Made A Sufficient Showing To Obtain An Evidentiary Hearing

In challenging the IRS's summonses, respondents did not rely on speculative assertions of impropriety. To the contrary, respondents made several specific allegations of bad faith and supported those allegations with the evidence available to them—affidavits and other evidence raising at least a plausible inference that the IRS's proffered purpose for enforcing the summonses was pretextual and that its actual purpose was improper. Those submissions are sufficient to justify an evidentiary hearing.

Respondents submitted considerable evidence suggesting that, when the IRS moved to enforce the summonses, it was no longer truly engaged in an *administrative* investigation and determination of tax liability—which (as the IRS itself recognizes in its Handbook) is the proper purpose of tax summonses—but rather was attempting to use the summonses to gain an unfair procedural advantage in Tax Court litigation against DHLP. As respondents showed, IRS Agent Fierfelder signed the FPAA on August 11, 2010 (JA 68), indicating that the administrative investigation was at an end, more than a month before the IRS issued the summonses on September 24, 2010. And although four of the summonses had a return date of October 25, 2010 (JA 35; Pet. App. 11a, 21a, 32a, 43a), the IRS made no immediate effort to enforce the summonses—even though its own policies provide that a decision regarding enforcement should be made

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Blair v. *United States*, 250 U.S. 273 (1919) and *United States* v. *Euge*, 444 U.S. 707 (1980)). But it is precisely because the IRS's investigative powers are so expansive that the possibility of abuse is cause for concern.

"[w]ithin 3 workdays" of the return date specified on the summonses. JA 128. Instead, the IRS simply issued the (previously signed) FPAA on December 28, 2010, confirming that the summonses were not needed for an administrative determination of DHLP's tax liability. It was not until April 28, 2011, six months after the return date and almost three months after DHLP challenged the FPAA in Tax Court, that the IRS sought enforcement of the summonses. This chronology, standing alone, raises a substantial question as to whether the IRS has any true interest in using the summons for their proper purpose of gathering information to determine DHLP's tax liability, or whether the IRS had some other, improper, motivation.

Other evidence submitted by respondents indicates the IRS is no longer actually pursuing an administrative determination of DHLP's tax liability but rather is using the summonses to bolster its position in litigation—and, in particular, to circumvent the strictures of Tax Court discovery rules. In Tax Court, third-party depositions are generally not available. T.C. Rules 70(a)(1), 80(a). Several pieces of evidence suggest that the IRS is hoping to use these outstanding summonses as a means to evade that limitation and obtain third-party discovery to which it is not entitled in litigation.

First, the timing alone suggests that this was the IRS's true purpose: The Tax Court proceeding had been underway for nearly three months before the IRS sought enforcement of the summonses, and it had been nearly six months since most of the original return dates.[21] Moreover, as detailed in the affidavit of attor-

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[21] In the grand jury context, when a defendant alleges that a subpoena was issued in order to develop a case post-indictment, and the government counters that the subpoena was issued pursu-

ney Richard Sapinski, when Christine Moog, a non-party to this case who was also summoned by Fierfelder in connection with the investigation of DHLP, complied with her summons, she was not interviewed by Fierfelder. JA 100 ¶ 11. Instead, the interview was conducted entirely by David Flassing, the IRS's trial counsel in the Tax Court proceeding. JA 98-100 ¶¶ 7-13. Respondents also submitted a letter from Flassing indicating that the IRS refused to submit the tax proceeding to IRS Appeals (a process similar to mediation) on the ground that he did not have "the complete facts of the case" because of the outstanding summonses. JA 102. During the Tax Court proceedings, the IRS also sought a continuance on the ground that the summonses were still outstanding. JA 105-106 ¶ 6.[22]

This form of gamesmanship is not a proper use of the summons procedure. There are two distinct phases

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ant to a proper investigation, courts consider whether there is some indication that such an investigation was, in fact, proceeding. *See In re Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985 (Simels)*, 767 F.2d 26, 29-30 (2d Cir. 1985) ("[S]ince not a single witness was called to the grand jury between October 10, 1984 and January 29, 1985, claims that the grand jury desired Simels' evidence as part of an active investigation seem particularly weak"); *United States* v. *Flemmi*, 245 F.3d 24, 28-29 (1st Cir. 2001) (suggesting that whether further review is required depends upon whether the grand jury ultimately issued a materially different indictment, because that would suggest a proper investigatory purpose). Here, there is no evidence of an active investigation after Agent Fierfelder signed the FPAA, let alone after the FPAA issued and the statute of limitations expired.

[22] Agent Fierfelder's declaration attesting to the IRS's good faith is also suggestive as it is written in the past tense. Instead of alleging an ongoing investigation into DHLP's tax liability, Agent Fierfelder merely noted that the IRS "has examined" DHLP's tax returns. JA 24.

in the tax enforcement process. In the investigatory auditing stage, the IRS has broad "inquisitorial" powers, including its summons power. But the Tax Code clearly envisions that IRS investigations ultimately will come to a close; thus, for partnerships, a Final Partnership Administrative Adjustment must be issued before the statute of limitations has passed. *See* 26 U.S.C. §§ 6229, 6501. Although the FPAA is subject to modification in certain circumstances, as a general matter, it represents the final numerical figure that the IRS will defend in Tax Court.

Once the IRS has issued an FPAA, the taxpayer may contest it in Tax Court. In Tax Court, the taxpayer and the IRS are supposed to stand on equal footing, and both are subject to the same substantially limited discovery rules, which the court developed after extensive comment from the public. *See* Hyman, *When Rules Collide: Procedural Intersection and the Rule of Law*, 71 Tulane L. Rev. 1389, 1408 n.64 (1997). Thus, whereas the IRS has broad, unilateral powers in the investigatory stage, in the context of tax litigation, its discovery powers are no greater than the taxpayers' entitlement to discovery against the IRS. That the IRS's investigatory powers are limited once Tax Court proceedings have begun is confirmed by the IRS's own written internal policies: Its manual provides that only in exceptional circumstances may agents file summonses after an FPAA has issued, and suggests that agents may never issue summonses once a judicial proceeding is underway. *See* JA 119-120 ("It may be appropriate to issue a summons after an SND has been filed *but before a Tax Court petition has been filed* in rare situations in which an *independent and sufficient reason exists to justify this action*" (emphasis in original)).

As courts have recognized in other contexts, an agency should not be allowed to use its broad investigative powers solely for the purpose of obtaining an advantage in litigation that would otherwise be contrary to court rules. That is not a proper use of the agency's *investigative* powers; once (as happened here) the agency closes its investigation and shifts to the litigation arena, it may not use its summons power solely for the purpose of bolstering its court case. *See Resolution Trust Corp.* v. *Thornton*, 41 F.3d 1539, 1545-1548 (D.C. Cir. 1994) (quashing RTC subpoena during pendency of litigation because the agency no longer had a valid investigatory purpose for the summons).[23] As noted, this is true even in the grand jury context, on which the government heavily relies; "[w]hile a grand jury wields broad investigatory powers prior to returning an indictment, courts uniformly have held that, once a targeted individual has been indicted, the government must cease its use of the grand jury in preparing its case for trial." *Id.* at 1546 (collecting cases) (internal quotation marks and brackets omitted).[24]

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[23] *See generally* Hyman, 71 Tulane L. Rev. 1389 (discussing this point at length); Hyman, *Procedural Intersection and Special Pleading: Is Tax Different?*, 71 Tulane L. Rev. 1729, 1740 (1997) ("Preventing such circumvention is consistent with the overall logic of the system.").

[24] *See also* United States Attorney's Manual § 9-11.120 ("[T]he grand jury cannot be used solely to obtain additional evidence against a defendant who has already been indicted. Nor can the grand jury be used solely for pre-trial discovery or trial preparation." (internal citations omitted)); Beale & Bryson, *Grand Jury Law and Practice* § 9:16 ("It is universally recognized that it is improper to use the grand jury for the purpose of preparing an already pending indictment for trial." (collecting cases)); Diamond, *Federal Grand Jury Practice and Procedure* § 4.01[C] (5th ed. 2012) (stating that most common misconduct associated with grand

Preventing the IRS from using its investigative power to secure an unfair advantage in litigation in circumvention of court rules is also consistent with the approach courts have taken under the relatively analogous statutory scheme governing bankruptcy discovery. Under Bankruptcy Rule 2004, those involved in the administration of bankruptcy laws, such as trustees and other parties in interest, are empowered to conduct wide-ranging discovery as long as it is plausibly related to the bankruptcy, but once litigation is commenced, Bankruptcy Rule 2004 cannot be used to circumvent discovery restrictions. *See In re Bennett Funding Group, Inc.*, 203 B.R. 24, 27-28 (Bankr. N.D.N.Y. 1996); *In re Szadkowski*, 198 B.R. 140, 141 (Bankr. D. Md. 1996).[25]

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jury investigations is "the abuse of the jury to gather evidence for a pending indictment").

[25] Aside from a stray sentence in a footnote (Pet. 14 n.2), the government has not argued in this Court—in its petition for certiorari, its reply brief (after this point was made in the brief in opposition), or in its brief on the merits—that the IRS may use its summons power purely to gain a litigation advantage once the administrative process has closed and the dispute has shifted to Tax Court. The district court ruled that a summons should not be quashed on the ground that it was being used to circumvent Tax Court discovery limitations. Pet. App. 15a. That point was not addressed in the court of appeals' decision, and the district court was incorrect. The district court relied on an out-of-circuit case, *PAA Management, Ltd.* v. *United States*, 962 F.2d 212 (2d Cir. 1992). But in *PAA Management*, the Second Circuit held only that neither the issuance of an FPAA nor the initiation of a Tax Court proceeding, standing alone, suffices to show that a summons should be quashed. *See id.* at 218 (initiation of tax court proceedings "does not *necessarily* obviate the legitimacy of further IRS administrative investigation") (emphasis added); *id.* at 217-218 (summons issued after FPAA was issued is not illegitimate "for this reason alone," and "mere existence" of collateral proceedings

Nor should the fact that the summonses were issued before the FPAA insulate the summons enforcement from challenge. First, given that the FPAA had already been signed at the time the summonses were issued and that the IRS made no effort to enforce them during the two months between their return date and the date the FPAA was issued, it is logical at least to infer the IRS issued the summonses solely to lay a predicate for their later use during the Tax Court proceedings. In any event, even if Agent Fierfelder had a proper investigative purpose when the summonses were first issued, this Court has never held that summonses can later be enforced for an improper purpose even if issued for a proper purpose originally. In fact, if

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does not deprive IRS of its investigatory powers). The *PAA* court took pains to make clear that it likely would be an abuse of process for the IRS to seek enforcement of a summons to evade tax court rules, rather than pursuant to a legitimate "inquisitorial" investigative purpose. *See id.* at 219 ("This is by no means to say that the IRS may resort to the summons power whenever the discovery or evidentiary rules in a judicial proceeding block access to or use of desired information. The purpose of the summons, which is an investigative and enforcement tool, differs from the purpose of discovery .... [T]he summons power is not a power to procure or perpetuate evidence at all; it is strictly inquisitorial, and ... the IRS's need to prepare its case by further examination is quite another matter from producing evidence in support of it." (punctuation altered; citation, ellipsis, and brackets omitted)); *see also PAA Mgmt., Ltd.* v. *United States*, 817 F. Supp. 425, 427 (S.D.N.Y. 1993) (decision on remand concluding that "summonses designed to enable the government to figure out what its theory was going to be" are permissible, but not summonses "primarily to collect evidence that would support a case that had otherwise been fully prepared"). At a minimum, if this Court vacates the judgment below, it should remand so that the court of appeals can consider whether evidence that the IRS is using a summons only to circumvent Tax Court discovery rules provides grounds for denying enforcement of the summons.

the courts are to prevent their processes from being abused, they should not countenance enforcement for an improper purpose, regardless of the intent with which the summonses were first issued. "It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused." *Powell*, 379 U.S. at 58.[26]

Second, and independently, respondents made sufficiently specific allegations and introduced sufficient evidence to raise a plausible inference that the IRS had issued the summons to retaliate against DHLP for declining to toll the statute of limitations a third time. (The government does not argue that such conduct would be a proper use of the summons power.) Before 2010, DHLP twice agreed to toll the statute of limitations to allow the IRS ample time to investigate its tax liabilities from 2005 through 2007. JA 95 ¶ 9. When the IRS requested yet another extension, DHLP—which had been cooperating with the IRS's investigation for more than a year—refused. As Mr. Clarke's affidavit

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[26] In the court of appeals, the government cited two other cases for the proposition that circumvention of Tax Court rules is not an improper use of the summons process, but even if this Court or the Eleventh Circuit adopted their holdings, neither would establish that respondents' allegations are deficient as a matter of law. In *Sugarloaf Funding LLC* v. *U.S. Department of Treasury*, 584 F.3d 340, 349 (1st Cir. 2009), the court specifically distinguished a case in which the IRS agent had admitted that the summons was not needed for its examination and was intended only to "protect the government's interest" in Tax Court. And in *Mary Kay Ash* v. *Commissioner*, 96 T.C. 459 (1991), the Tax Court considered only whether a protective order should be issued barring the IRS from using evidence obtained through a summons—in effect, rejecting an exclusionary rule; it did not rule whether the summons should actually have been enforced, which, it recognized, is a matter for the district court to decide. *See id.* at 462, 472-473.

explains, "immediately" after DHLP refused to grant the third extension, "despite having not asked for additional information for some time, the Government suddenly issued" expansive summonses. *Id.* This evidence, coupled with the circumstantial evidence that the IRS neither needed nor intended to use the evidence from the summonses for their investigation, allows a court to "infer a possibility" of an improper purpose. *See United States* v. *Kis*, 658 F.2d 526, 540 (7th Cir. 1981).

The evidence respondents have been able to marshal at least suggests that the IRS is not using the summonses for their proper purpose. At this stage, respondents request only a limited adversarial hearing at which to question the IRS on this point. That hearing may, or may not, enable the district court to reach a conclusion or demonstrate that further discovery may be warranted. But in light of their specific, plausible allegations and the substantial evidence they adduced in spite of their relative lack of access to potential evidence, under any standard, respondents were entitled to this limited, but important, relief.[27]

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[27] If this Court disagrees that respondents have marshaled sufficient evidence to show entitlement to an evidentiary hearing, it should remand and provide the respondents with an opportunity to submit further evidence. Respondents reasonably relied on binding circuit precedent in preparing their opposition to enforcement of the summonses, and to the extent that this Court adopts a new standard, respondents should be entitled to an opportunity to satisfy that standard.

Respectfully submitted.

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MARCH 2014

REPLY BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
APR 14 2014
OFFICE OF THE CLERK

No. 13-301

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL CLARKE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

No. 13-301

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL CLARKE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondents do not defend the broad rule applied by the Eleventh Circuit, under which a district court must provide an objector to an Internal Revenue Service (IRS) summons with an opportunity to examine IRS agents whenever the objector makes an unsupported allegation of bad faith. Respondents now agree that a district court may deny a request to examine IRS agents when the summons objector makes only "conclusory" or "speculative" allegations of improper purpose. Resp. Br. 19. Although respondents attempt to recharacterize the court of appeals' decision as consistent with that concession, their efforts are unavailing. The Eleventh Circuit stated that a summons opponent is *not* required "to provide factual support for an allegation of an improper purpose" in order to question IRS agents at an evidentiary hearing. Pet. App. 5a. That holding conflicts with numerous deci-

sions of other circuits, and it warrants reversal by this Court.

Respondents explain that a summons opponent is entitled to a fair opportunity to contest the summons, and that districts courts have occasionally allowed examination of IRS officials. Those arguments are correct as far as they go, but neither is responsive to the government's criticisms of the court of appeals' decision. The government has consistently recognized that a summons opponent is entitled to challenge the enforcement of an IRS summons on any appropriate ground, and that a district court may allow examination of IRS officials when the court finds reason to infer that the government's purpose may be improper. The only issue before this Court, however, is whether a summons opponent is *always* entitled to examine IRS officials based on a conclusory allegation of bad faith. The Court should answer that question in the negative.

A. Respondents Mischaracterize The Court Of Appeals' Holding

1. The court of appeals squarely held that a district court may not deny a summons objector's request to examine IRS officials about their purpose in issuing a summons, even when the objector's request is based on nothing more than unsupported and conclusory allegations. The district court in this case refused respondents' request to examine IRS officials, concluding that their allegations of improper purpose were "mere conjecture unsupported by evidence." Pet. App. 14a; see *id.* at 17a-19a. In reversing that decision, the court of appeals did not disagree with the district court's assessment of the factual support (or lack thereof) for respondents' allegations. The court

of appeals instead held that, notwithstanding respondents' failure to identify pre-existing evidence of improper IRS motives, respondents were entitled to examine IRS officials in order "to obtain * * * facts" supporting their allegations. *Id.* at 5a.

Respondents do not defend that holding. On the contrary, respondents now concede that a district court may deny a request for a hearing to examine IRS officials when a summons objector "assert[s] conclusory, implausible, or speculative grounds that the government is acting in bad faith." Resp. Br. 19. Respondents suggest, however, that the court of appeals ruled in their favor because it found their allegations of improper purpose to be "substantial." *Id.* at i. Nothing in the court of appeals' opinion supports that characterization. Indeed, the court of appeals specifically rejected a substantiality requirement as unduly restrictive, holding that district courts may not "requir[e] the taxpayer to provide factual support for an allegation of an improper purpose" before allowing the summons opponent to examine IRS officials. Pet. App. 5a.[1]

Respondents similarly mischaracterize (Br. 24-25 & n.17) the Eleventh Circuit's previous holding in *Nero Trading, LLC* v. *U.S. Dep't of Treasury, IRS*, 570 F.3d 1244, 1249 (2009). Respondents emphasize (see

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[1] Respondents also fail to grapple with the court of appeals' separate holding that they were not entitled to discovery because "the full 'panoply of expensive and time-consuming pretrial discovery devices may not be resorted to as a matter of course and on a mere allegation of improper purpose.'" Pet. App. 5a n.3 (quoting *Nero Trading, LLC* v. *U.S. Dep't of Treasury, IRS*, 570 F.3d 1244, 1249 (11th Cir. 2009)). That explanation for denying respondents' discovery request would make no sense if respondents had made a substantial showing of an improper IRS purpose.

Br. 24) the statement in *Nero Trading* that "the scope of any adversarial hearing in this area is left to the discretion of the district court." 570 F.3d at 1249. But respondents ignore the context in which that statement appeared.

The court in *Nero Trading* "refuse[d] to create a rule that would require [a] taxpayer to allege a factual background" for a charge of improper purpose "before he is entitled to" "question the Service concerning its reasons for issuing the summonses." 570 F.3d at 1250; see *id.* at 1249 ("[A]n allegation of improper purpose is sufficient to trigger a limited adversary hearing where the taxpayer may question IRS officials concerning the Service's reasons for issuing the summons.") (quoting *United States* v. *Southeast First Nat'l Bank*, 655 F.2d 661, 667 (5th Cir. 1981)). The statement on which respondents rely simply recognized that the district court at such a hearing may constrain the *scope* of an objector's questioning of IRS officials. The court in *Nero Trading* made clear, however, that a summons opponent is entitled to question those officials about their motives for issuing the summons, even if the opponent has proffered no factual support for his allegation of improper purpose.

2. As discussed in the government's certiorari-stage filings, the Eleventh Circuit's rule conflicts with the rules adopted by every other court of appeals with jurisdiction over IRS summons-enforcement proceedings. See Pet. 15-19; Cert. Reply Br. 5-8. Respondents contend that the First, Fifth, and Ninth Circuits "follow a similar approach," Resp. Br. 19-20, to that applied below. That is incorrect.

Respondents rely (Br. 22) on the First Circuit's decision in *United States* v. *Salter*, 432 F.2d 697 (1970).

But, as discussed in the government's certiorari-stage reply brief (at 6-7), the decision in *Salter* no longer states the applicable rule in the First Circuit. *Salter* involved an allegation that the IRS had issued a summons for an improper criminal-investigation purpose. 432 F.2d at 698. As our opening brief explains (at 17-18), however, Congress's subsequent enactment of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324, made irrelevant any objection that a summons was issued for the purpose of investigating possible criminal liability. In post-TEFRA decisions, the First Circuit has clarified that a district court may deny a summons objector's request to examine IRS officials when the objector alleges an improper purpose but provides no evidentiary support. *Sugarloaf Funding, LLC* v. *U.S. Dep't of Treasury*, 584 F.3d 340, 351 (2009); *Copp* v. *United States*, 968 F.2d 1435, 1438 n.1 (1992), cert. denied, 507 U.S. 910 (1993).

The Fifth Circuit has taken the same approach. Compare *Southeast First Nat'l Bank*, 655 F.2d at 664-668 (holding pre-TEFRA that a summons objector was entitled to examine IRS agents based on an allegation of an improper criminal-investigation motive) with *Zugerese Trading LLC* v. *IRS*, 336 Fed. Appx. 416, 418 (2009) (holding that the district court did not abuse its discretion by forgoing an evidentiary hearing despite summons objectors' claim that a hearing was necessary to support their assertion that the IRS had issued the summons for an improper purpose), and with *Mitchell* v. *Thomas*, 239 Fed. Appx. 56, 57 (2007) (holding post-TEFRA that a summons objector who had "provided no support for his claim that the summons was issued in bad faith" was not entitled to

examine IRS officials); see also *In re EEOC*, 709 F.2d 392, 397-399 (1983) (noting that pre-TEFRA Fifth Circuit rule granting opportunity to examine IRS agents based on bare allegation of bad faith had been "legislatively modified"). Indeed, the Eleventh Circuit has acknowledged the Fifth Circuit's understanding that TEFRA changed the legal landscape with respect to this question, while noting its own disagreement with the Fifth Circuit's conclusion. *Nero Trading*, 570 F.3d at 1250 n.4 (citing *In re EEOC*, 709 F.2d at 398-399). The Ninth Circuit's pre-TEFRA approach, see *United States* v. *Church of Scientology*, 520 F.2d 818, 824-825 (1975), likewise no longer applies, see *Fortney* v. *United States*, 59 F.3d 117, 121 (9th Cir. 1995) (holding that "[a] taxpayer is not entitled to an evidentiary hearing" "at which he could examine witnesses and inquire into the IRS' good faith" "unless he or she presents some 'minimal amount of evidence' to support a contention of a lack of good faith") (quoting *United States* v. *Stuckey*, 646 F.2d 1369, 1372 (9th Cir. 1981), cert. denied, 455 U.S. 942 (1982)).

B. Respondents Were Provided A Sufficient Opportunity To Challenge The Summonses As Required By *United States* v. *Powell*

Rather than defend the court of appeals' holding, respondents argue that (1) a summons objector is entitled to *some* opportunity to challenge a summons at an adversary hearing, and (2) a district court may *sometimes* allow a summons objector to examine IRS officials about their motives for issuing a summons. The government agrees with both of those propositions. Neither singly nor in combination, however, do

they support the broad rule adopted by the court below.

1. Respondents argue "that a taxpayer should have the opportunity for an 'adversary hearing' to test whether the IRS is seeking to abuse the district court's process through improper enforcement of a summons." Resp. Br. 14-15. That proposition is not in dispute. As the government has explained (*e.g.*, Pet. Br. 18-22), "[i]n any IRS summons-enforcement proceeding, an objector is entitled to an adversary hearing where it 'may challenge the summons on any appropriate ground.'" *Id.* at 20 (quoting *United States* v. *Powell*, 379 U.S. 48, 58 (1964)).

As respondents explain (see Br. 12-15), the IRS may enforce a contested summons only by invoking the power of a district court. Respondents are also correct (Br. 13-14) that a district court should not enforce a summons if doing so would be an abuse of the court's process. Those principles are consistent with the applicable statutory provisions, see 26 U.S.C. 7402(b), 7604(a); with this Court's holding in *Powell*, 379 U.S. at 51-52, 57-58; and with the government's arguments in this case, see Pet. 11; Cert. Reply Br. 4-5; Pet. Br. 18-22. Respondents' hyperbolic assertion that the government seeks "unchecked latitude to require taxpayers [to] submit to intrusive demands," Resp. Br. 28, is therefore baseless.

The judiciary's check on the IRS's summons authority is governed by this Court's decision in *Powell*. In order to obtain enforcement of a summons, the IRS must establish that the summons was issued in good faith and in compliance with applicable statutory re-

quirements. *Powell*, 379 U.S. at 57-58.[2] That is precisely the type of "check against Executive Branch overreach" that is contemplated by the decisions on which respondents rely. Resp. Br. 13-14 (citing *SEC* v. *Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 128 (3d Cir. 1981) (noting that a request for enforcement of a Securities and Exchange Commission subpoena should comply with the standards announced in *Powell*), and *United States* v. *Security State Bank & Trust*, 473 F.2d 638, 642 (5th Cir. 1973) (noting that, in order to obtain enforcement of a Department of Agriculture subpoena, the government must sustain a minimum burden akin to that established in *Powell* of demonstrating that the subpoena was issued for a lawful purpose)). When the IRS establishes that "the summons meets statutory requirements and [was] issued in good faith, as [the Court] defined that term in [*Powell*], compliance [with the summons] is required," *United States* v. *Stuart*, 489 U.S. 353, 356 (1989), unless the summons objector satisfies its "burden of showing an abuse of the court's process," *Powell*, 379 U.S. at 58.

Respondents argue that the government seeks to "transform summons enforcement into an *ex parte* affair." Resp. Br. 10; see *id.* at 15-18. That assertion is also baseless. An "ex parte" action is one undertaken on behalf of one party "without notice to or argument from the adverse party." *Black's Law Diction-*

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[2] Under *Powell*, the IRS must establish that the investigation will be conducted pursuant to a legitimate purpose, that the summons inquiry may be relevant to that purpose, that the information sought is not already in the possession of the IRS, and that the administrative steps required by the Internal Revenue Code have been followed. 379 U.S. at 57-58.

ary 657 (9th ed. 2009). Respondents received notice of the summonses and (when they refused to comply) subsequently received notice of the IRS's enforcement action. Respondents filed two pleadings arguing that the summonses should not be enforced. Pet. App. 64a-84a; J.A. 46-56. Nothing about the summons-enforcement proceedings in this case was ex parte.

Respondents could have requested an adversary hearing at which they could have argued the legal positions set forth in their pleadings and presented any evidence in their possession. Respondents never requested that type of hearing, instead insisting that, in order for such a "proceeding to be meaningful," respondents must have an opportunity to examine IRS agents and obtain discovery from the IRS. See Respondents' and Intervenors' Reply in Supp. of Mot. for Summ. Dismissal or Scheduling of Pretrial Conf., No. 11-mc-80456, Docket entry No. 22, at 8 (S.D. Fla. Nov. 17, 2011). In this Court, respondents repeat their contention that an adversary hearing is "meaningless" if it does not include examination of IRS officials. Resp. Br. 2, 17-18.

In defining the criteria used to establish the IRS's good faith, the Court in *Powell* specifically rejected the argument that such an approach would "make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered." 379 U.S. at 58. The Court emphasized that a taxpayer is entitled at an adversary hearing to "challenge [a] summons on any appropriate ground." *Ibid.* (quoting *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964)). Nothing in *Powell* suggests, however, that a summons objector is entitled to engage in a fishing expedition about the

motives of IRS agents in the absence of pre-existing evidence that raises an inference of improper purpose.

Finally, respondents assert that the Eleventh Circuit requires examination of IRS officials only when such examination "would provide the sole realistic opportunity for a taxpayer to acquire evidence in support of his allegation of bad faith." Resp. Br. 24 n.17. No such limitation appears in the court of appeals' decision. Nor would such a limitation be consistent with either the statutory scheme governing IRS summons enforcement or the rules generally governing enforcement of analogous administrative subpoenas. In any event, under respondents' overall view of the case, such a limitation would in practice impose no constraint at all, since respondents also assert that "[e]vidence of bad faith will almost always be exclusively in the possession of the government." *Id.* at 2.

2. Respondents argue that "[t]he government's proposed rule" would never "allow[]" a summons opponent to question IRS officials unless the objector first "produce[d] its own significant affirmative evidence." Resp. Br. 16. The issue presented in this case is whether a summons objector is *entitled* to question IRS officials based on an unsupported allegation of bad faith, so that a district court's refusal to allow such questioning can be reversed as an abuse of discretion. Under the government's proposed rule (adopted in every court of appeals with jurisdiction over summons-enforcement proceedings except the Eleventh Circuit), a district court may deny an objector's request for examination when the district court finds no basis to infer the possibility of an improper purpose. The government has consistently acknowl-

edged (Pet. 13; Cert. Reply Br. 9; Pet. Br. 21), however, that a district court has discretion to allow a summons opponent to question IRS agents when it believes that a legitimate dispute exists and views such questioning as an appropriate means of clarifying the agency's motives.

Thus, while respondents cite cases outside the Eleventh Circuit in which district courts have permitted examination of IRS officials (see Resp. Br. 21-24), those decisions actually support the government's position. District courts in those other circuits have proved "amply capable" (*id.* at 23) of protecting the rights of taxpayers who "develop facts from which a court might *infer* a *possibility* of some wrongful conduct by the Government." *United States* v. *Kis*, 658 F.2d 526, 540 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982). It is the Eleventh Circuit, not the government, that gives "insufficient credit to the management capabilities of the district courts." Resp. Br. 22.

C. The Court Of Appeals' Expansive Rule Is Inconsistent With This Court's Treatment Of IRS Summonses

As the government's opening brief explains (at 16-18, 21-26), the Eleventh Circuit's rule is inconsistent in a number of ways with this Court's treatment of IRS summonses.

1. Congress intended summons-enforcement proceedings to "be summary in nature." *Stuart*, 489 U.S. at 369 (quoting S. Rep. No. 494, 97th Cong., 2d Sess. 285 (1982)). The purpose of issuing and enforcing a summons is "to inquire," not to accuse a taxpayer of wrongdoing or to determine any taxpayer's liability. *United States* v. *Bisceglia*, 420 U.S. 141, 146 (1975). By requiring the IRS to apply to a federal court for

enforcement of a summons, Congress gave summons recipients "[s]ubstantial protection" against abuse of the IRS's broad investigative authority. *Ibid.*; see *Reisman*, 375 U.S. at 449. The Court has made clear, however, that a district court's role does not include "oversee[ing] the [IRS's] determinations to investigate" beyond verifying that the summons was issued in good faith and in compliance with statutory requirements. *Powell*, 379 U.S. at 56; *id.* at 57-58. So long as the district court is satisfied that the IRS has established its compliance with the *Powell* factors, the court need not allow further examination of IRS agents in order to fulfill its oversight role.

2. The court of appeals' approach to IRS summons enforcement subverts the presumption of regularity afforded to official action. So long as the IRS makes the threshold showing that *Powell* requires (see note 2, *supra*), the summons is entitled to the same "presumption of regularity" that "supports the official acts of public officers" in other contexts. *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926); see *United States Postal Serv.* v. *Gregory*, 534 U.S. 1, 10 (2001). "[I]n the absence of clear evidence to the contrary, courts presume that [government officials] have properly discharged their official duties." *Chemical Found.*, 272 U.S. at 14-15. The logical implication of that presumption is that, once the IRS makes the affirmative showing that the statute and this Court's decisions require, and a summons objector identifies no evidence that supports his allegation of bad faith, the summons may be enforced without further inquiry. The Eleventh Circuit, by contrast, treats an objector's *un*supported allegation of bad faith as suffi-

cient in every case to impose upon the IRS a duty of further explanation.

3. The Eleventh Circuit's automatic-examination rule is inconsistent with this Court's treatment of analogous administrative and grand jury subpoenas. See Pet. Br. 23-26. The Court has long recognized that a federal agency may issue judicially enforceable subpoenas in order to obtain information relevant to their statutory responsibilities. See *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950); *Oklahoma Press Publ'g Co.* v. *Walling*, 327 U.S. 186, 217 (1946). The Court has also held that one who opposes a subpoena bears the burden of establishing a valid objection to its enforcement. See *Morton Salt Co.*, 338 U.S. at 653-654 (explaining that objector bore the burden of "present[ing] evidence" and "mak[ing] a record" that an administrative order imposed an unreasonable burden); *Oklahoma Press Publ'g Co.*, 327 U.S. at 218 (noting that objectors did not carry their burden because their pleadings did not "set forth" "sufficient reason" not to enforce subpoena).

With respect to grand jury subpoenas, respondents argue that district courts have sometimes "allowed challenges to grand jury subpoenas to go forward when it appears that the government is misusing the grand jury." Resp. Br. 28. That is certainly true, just as it is true that some district courts have appropriately permitted examination of IRS agents when it appeared that the IRS might be misusing its summons authority. Respondents identify no case, however, in which a court of appeals has held that a district court abused its discretion by denying a request to examine grand jurors (or prosecutors) based on a subpoena

recipient's bare allegation that the government had issued the subpoena for an improper purpose.

To be sure, district courts have discretion to "conduct hearings or review transcripts of the grand jury proceedings" in response to allegations of improper purpose. Resp. Br. 29 (citing cases). District courts also have discretion, however, to enforce grand jury subpoenas without examining grand jurors or prosecutors when the district court finds no reason to infer wrongdoing.[3] Respondents rely (Br. 29) on several court of appeals decisions that have nothing to do with quashing subpoenas. Those decisions instead addressed whether evidence obtained pursuant to a grand jury subpoena may be used in a later trial, and none of them considered a subpoena target's request to examine grand jurors or prosecutors. See *United States* v. *Badger*, 983 F.2d 1443, 1458 (7th Cir.), cert. denied, 508 U.S. 928, and 510 U.S 820 (1993); *United States* v. *Jenkins*, 904 F.2d 549, 559 (10th Cir.), cert. denied, 498 U.S. 962 (1990); *United States* v. *Sellaro*, 514 F.2d 114, 122 (8th Cir. 1973), cert. denied, 421 U.S. 1013 (1975).

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[3] In attempting to distinguish this Court's holding in *United States* v. *R. Enterprises, Inc.*, 498 U.S. 292 (1991), respondents rely on the Court's statement that "a court may be justified in a case where unreasonableness is alleged in requiring the Government to reveal the general subject of the grand jury's investigation before requiring the challenging party to carry its burden of persuasion." Resp. Br. 29-30 n.19 (quoting *R. Enters.*, 498 U.S. at 302). That statement merely confirms the government's point that district courts have discretion to determine what steps are appropriate in response to an allegation of bad faith. The IRS is already required, moreover, to "reveal the general subject of [its] investigation," *ibid.*, before it is entitled to have a summons enforced.

The First Circuit's decision in *In re Grand Jury Proceedings*, 814 F.2d 61 (1987) (cited at Resp. Br. 30), supports the government's position in this case. That court noted both that "grand jury proceedings are granted a presumption of regularity," and that "courts have looked at the circumstances of particular cases" raising challenges to the use of grand jury evidence "in deciding the kind of showing that they would require either from the party challenging the grand jury or from the government." 814 F.2d at 71. In eschewing a bright-line rule like the one applied by the Eleventh Circuit in this case, the First Circuit relied on earlier decisions in which it had refused to require the government to make a special showing, or had declined to "open[] up the grand jury proceedings to the movant," based on "unsubstantiated" allegations or "generalized suspicion[s]." *Id.* at 71-72 (citing *In re Pantojas*, 628 F.2d 701 (1st Cir. 1980), and quoting *United States* v. *Doe*, 455 F.2d 1270, 1274-1275 (1st Cir. 1972)). The Eleventh Circuit should have applied a similar rule in the analogous context of this case.

Respondents also miss the point in arguing that other agencies' subpoena powers are "quite different from that of the IRS," and that there are "structural distinctions between the grand jury and the IRS." Resp. Br. 28, 32. The government has never contended that an IRS summons must be treated exactly as those types of subpoenas would be. See Pet. Br. 25 ("To be sure, the IRS's summons authority is not directly governed by this Court's decisions addressing the subpoena power of grand juries or other federal agencies."). This Court has repeatedly stated, however, that the rules governing enforcement of adminis-

trative and grand jury subpoenas provide helpful analogues in determining what rules should govern enforcement of IRS summonses. *United States* v. *Euge*, 444 U.S. 707, 712 (1980); *Bisceglia*, 420 U.S. at 147-148; *Powell*, 379 U.S. at 57.

D. This Court Should Reverse The Judgment Of The Court Of Appeals And Remand For Application Of The Correct Legal Standard

1. Respondents argue at length (Br. 34-42) that their allegations of improper purpose were supported by sufficient evidence to warrant an opportunity to examine IRS officials. Because the court of appeals did not consider whether respondents had offered any evidentiary support for their allegations, see Pet. App. 4a-5a, those arguments are irrelevant to the question presented in this Court. The court of appeals' holding that no such evidentiary support is necessary should be reversed; respondents may then argue on remand that they are entitled to examine IRS officials under the appropriate legal standard.

Respondents contend (Br. 34-42) that the IRS had (or might have had) two improper purposes for issuing the summonses: (1) to circumvent Tax Court discovery rules in violation of the Internal Revenue Manual (IRM) and (2) to retaliate for respondents' refusal to extend the statute of limitations.[4] The district court correctly rejected those arguments. The court held

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[4] It is generally recognized that "[t]he Internal Revenue Manual does not have the force of law and does not confer rights on taxpayers." *Fargo* v. *Commissioner*, 447 F.3d 706, 713 (9th Cir. 2006); see *Matter of Carlson*, 126 F.3d 915, 922 (7th Cir. 1997), cert. denied, 523 U.S. 1060 (1998); *Tavano* v. *Commissioner*, 986 F.2d 1389, 1390 (11th Cir. 1993); *Marks* v. *Commissioner*, 947 F.2d 983, 986 n.1 (D.C. Cir. 1991).

that respondents' circumvention argument was "incorrect as a matter of law," and it explained that respondents had "offer[ed] no evidence to support [their] suspicions that this enforcement proceeding violates the IRM[]." Pet. App. 15a, 19a. The court also held that respondents' retaliation allegation was "mere conjecture unsupported by evidence" and "a naked assertion." *Id.* at 14a.

On appeal, the Eleventh Circuit noted respondents' allegation that "[o]ne of the reasons the IRS may have issued the summonses * * * was solely in retribution for [taxpayer] Dynamo's refusal to extend a statute of limitations deadline." Pet. App. 5a. The court stated that, "[i]f the IRS issued the summonses only to retaliate against Dynamo, that purpose 'reflect[s] on the good faith of the particular investigation,' and would be improper." *Ibid.* (brackets in original) (quoting *Powell*, 379 U.S. at 58). The court further held that, "[u]nder [its] precedents, [respondents] were entitled to a hearing to explore their allegation of an improper purpose." *Ibid.* The court of appeals did not address whether any evidence supported that allegation because (as discussed above) the court held that a taxpayer cannot be required "to provide factual support for an allegation of an improper purpose" before he is entitled to examine IRS officials. *Ibid.* The court of appeals did not mention respondents' separate allegation concerning possible circumvention of Tax Court discovery rules (beyond noting that respondents had alleged "at least four improper purposes," *id.* at 4a-5a).

In the Court, respondents offer a lengthy argument (Br. 34-41) in support of their circumvention allegation, and a more truncated argument (Br. 41-42) in

support of their retaliation theory. The government disagrees with the substance of those arguments, as explained in our pleadings in the district court and court of appeals (and as noted in our opening brief, see Pet. Br. 27-28 n.4). Those issues, however, are not properly presented for resolution by this Court. If the Court clarifies that a district court does not abuse its discretion by denying a summons opponent's request to examine IRS officials based on unsupported allegations of improper purpose, the court of appeals can consider on remand whether respondents offered sufficient evidence of improper motive to entitle them to examine the IRS agents under the correct standard.

2. Respondents discount (see Br. 22-24) the government's concern that the Eleventh Circuit's rule would undermine Congress's intent that summons-enforcement proceedings be summary in nature. Respondents contend that the government has "not point[ed] to anything to suggest that tax enforcement has been unduly hindered in those circuits" where a bare allegation of improper purpose can trigger a right to an evidentiary hearing. *Id.* at 22. As discussed above, however, the Eleventh Circuit is the *only* court of appeals to have adopted that approach. Extension of that rule to the rest of the country would have an evident potential to protract and impede summons-enforcement proceedings. The National Taxpayer Advocate's annual report to Congress identified 117 summons-enforcement cases decided during the one-year period from mid-2012 to mid-2013 alone. See 1 Nat'l Taxpayer Advocate, *2013 Annual Report to Congress* 362, 365-370 (Dec. 31, 2013), http://www.taxpayeradvocate.irs.gov/2013-annual-report/full-

2013-annual-report-to-congress/. Summons opponents should not be permitted to turn each such proceeding into a mini-trial on the basis of a conclusory allegation.

Respondents' circumvention theory illustrates the improper incentives the Eleventh Circuit's approach creates. The summonses in this case were issued before the IRS issued its Final Partnership Administrative Adjustment (FPAA).[5] See J.A. 25; Pet. App. 11a-12a, 21a-22a, 32a-33a, 43a-44a, 54a-55a). This Court has recognized that "[t]he rights and obligations of the parties bec[o]me fixed when [a] summons [i]s served." *Couch* v. *United States*, 409 U.S. 322, 329 n.9 (1973). As of the dates the summonses were issued, respondents had a legal obligation to provide the information requested.

Respondents' circumvention argument is premised on the fact that the IRS first sought judicial enforcement of the summonses after Dynamo filed its petition in the Tax Court in February 2011. See Resp. Br. 35. Respondents contend that, even if the summonses were originally issued for a permissible purpose, at a time when no pertinent litigation was pending, the district court could nevertheless treat the summonses as an improper effort to circumvent Tax Court discov-

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[5] Respondents argue (Br. 3, 40) that the real date of the FPAA should be viewed as August 11, 2010, rather than as December 28, 2010. That is incorrect. August 11, 2010, is the date when the examining agent signed her proposed changes to the partnership returns being examined. J.A. 68. That interim step did not complete the decision-making process of the IRS as a whole, however, and it therefore did not render the FPAA final. The FPAA ultimately was signed by the Territory Manager on December 28, 2010 (J.A. 66) and was mailed on that date (J.A. 59). Under the Internal Revenue Code, the legally significant FPAA date is its mailing date. See 26 U.S.C. 6225(a), 6226(a), 6229(d) and (f).

ery rules. See *id.* at 40-41. This Court has characterized the relevant inquiry, however, as whether the summons was *issued* for an improper purpose. See *Powell*, 379 U.S. at 58; see also *Ash* v. *Commissioner*, 96 T.C. 459, 468 (1991) (holding that administrative summonses issued by the IRS before the filing of a Tax Court petition "do not pose a threat to the integrity of [the Tax Court's] Rules").

Respondents' approach would create an incentive for a recalcitrant summons recipient to impede enforcement proceedings, either by filing his own petition in the Tax Court or (in the case of a third-party recipient) by resisting compliance with the summons long enough to allow the taxpayer to file such a petition. When the summonses were issued, there were no pending Tax Court proceedings, and respondents therefore had no basis for alleging a purpose of circumventing Tax Court discovery rules. Allowing summons opponents (or taxpayers aligned with those opponents) to manufacture their own grounds for opposition would create incentives for manipulative conduct, delay summons-enforcement proceedings, and erode Congress's streamlined enforcement scheme.

In any event, this Court should reject respondents' request (*e.g.*, Br. 2-3) to determine in the first instance whether, under the appropriate legal standard, respondents introduced sufficient evidence of improper purpose to entitle them to examine the IRS agents. Because the court below held that a bare *allegation* of improper purpose was enough, it did not evaluate respondents' supporting evidence (beyond holding that respondents were not entitled to additional discovery, see Pet. App. 5a n.3). This Court has often cautioned that it is "a court of review, not of first

view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Consistent with the Court's usual practice, the application of the correct legal standard to the facts of this case should be left to the court of appeals on remand.

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For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

APRIL 2014